Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term 1994

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

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Date: October 5, 1994

QUESTIONS PRESENTED

1. Did the Florida courts improperly give issue preclusion effect under the Full Faith and Credit Clause of the United States Constitution to an Alabama judgment despite the following undisputed facts showing that petitioner did not receive a full and fair hearing before an impartial tribunal?

A. Counsel for respondents contributed at least $100,000 to the election campaigns of members of the Alabama Supreme Court.

B. The Alabama Supreme Court held *sua sponte* that the Alabama courts had personal jurisdiction over petitioner on a theory that had not been raised below and had not been briefed or argued in the trial court and denied petitioner any opportunity to show that its decision was contrary to decisions of this Court under the Fourteenth Amendment limiting the personal jurisdiction of state courts.

C. The Alabama Supreme Court imposed liability on petitioner under Alabama law when no liability existed under the laws of any of the

relevant jurisdictions -- New York, Florida, or England.

D. The Alabama Supreme Court upheld the trial court's toleration of blatant appeals by respondents' counsel to regional and other bias.

E. The Alabama Supreme Court, in order to hold petitioner liable, overturned both procedural and substantive precedents, which until this case had been in accord with settled law in other common law jurisdictions.

2. Was it a denial of due process of law for the Florida courts to give issue preclusion effect to the decision of the Alabama Supreme Court under the circumstances set forth in Question 1?*

*The holdings of the Florida courts were (a) that the facts set forth in A through E, individually and collectively, do *not* raise a question of fact as to whether petitioner received a full and fair hearing in the Alabama Supreme Court and (b) that accordingly summary judgment was properly granted against petitioner without any opportunity to inquire further into the facts by discovery.

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Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Petitioner Leon C. Baker ("Baker") prays that a Writ of Certiorari be issued to review the opinion and judgment of the Fourth District Court of Appeal of the State of Florida rendered on March 2, 1994. The Supreme Court of Florida declined jurisdiction on July 7, 1994.

OPINION BELOW

The Florida Supreme Court issued no opinion in declining jurisdiction. The decision of the Florida Fourth

District Court of Appeal is not yet reported and is set forth at page A-3 of the Appendix.

JURISDICTION

The decision of the Florida Fourth District Court of Appeal was entered on March 2, 1994. Petitioner's application for rehearing was denied on March 15, 1994. The Florida Supreme Court declined discretionary jurisdiction of Baker's appeal on July 7, 1994. This Petition for a Writ of Certiorari was filed within 90 days of the order of the Florida Supreme Court declining jurisdiction. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, §8 of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *.

Article IV, §1 of the United States Constitution provides in pertinent part:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law * * *.

The Florida statutory provision involved is the Florida Uniform Enforcment of Foreign Judgments Act, Fla. Stats. §55.501 through §55.509, which is set forth at pages A-67 through A-70 of the Appendix to this Petition.

STATEMENT OF THE CASE

A. Nature of the Case

Baker brought this action under the Florida Uniform Enforcement of Foreign Judgments Act, Fla. Stats. §55.501 through §55.509, to challenge the validity of a judgment the respondents ("the Bennetts") had obtained against him in Alabama and which they had filed with the Clerk of Palm Beach County, Florida. Baker alleged that the Alabama courts had no personal jurisdiction over him.

The Bennetts responded that Baker is barred from asserting Alabama's lack of jurisdiction by issue preclusion under the Full Faith and Credit Clause of the United States Constitution, because the Alabama Supreme Court had ruled that the Alabama courts had personal jurisdiction over

him.

Baker rejoined that the decision of the Alabama Supreme Court may not be given issue preclusion effect under the Full Faith and Credit Clause (a) because it is tainted by an appearance of impropriety and (b) because Baker did not receive a full and fair hearing on personal jurisdiction in the Alabama Supreme Court.

The appearance of impropriety stems from the fact, among others, that counsel for the Bennetts contributed more than $100,000 to the election campaigns of justices of the Alabama Supreme Court. Moreover, the hearing Baker received on jurisdiction was neither full nor fair because he was not given an opportunity to present decisions of this Court showing that the Alabama Supreme Court's *sua sponte* ruling on jurisdiction violated the Fourteenth Amendment of the United States Constitution.

The Florida courts nevertheless applied issue preclusion under the Full Faith and Credit Clause and have refused to consider Baker's contention that the Alabama courts had no constitutional power to enter a judgment against him.

B. The Facts[1]

The Alabama lawsuit in which the Bennetts obtained their judgment against Baker arose out of the purchase by J.R. Bennett of an interest in computer equipment located in England. The Bennetts' principal purpose was to obtain a deferral of federal and Alabama income taxes.[2] J.R. Bennett purchased his interest from an Alabaman, Donald Gibbs. J.R. Bennett and Gibbs had no prior relationship.

Gibbs and an associate had purchased the computer equipment six months earlier from an English company. Baker, a New York lawyer, had represented the English seller in the purchase by Gibbs and his associate.

The resale by Gibbs of part of his interest to J.R.

[1]The Florida trial court's decision granted summary judgment dismissing petitioner's complaint. The Florida record, therefore, consists solely of pleadings and affidavits. Relevant portions are reproduced in the appendix to this Petition. The record in the Alabama courts has two parts, the reporter's record, a transcript of the trial proceedings, and the clerk's record, pleadings, motions, and other documents filed in the case. Citations to pages of the Alabama transcript are preceded by R (e.g., R32) and to the Alabama clerk's record by C (e.g., C34). Citations to the Appendix to this petition are preceded by A (e.g., A-21). Petitioner's Alabama exhibits are preceded by P (e.g., P21) and respondents' Alabama exhibits are preceded by D (e.g., D4).

[2]Computer "tax shelters" do not avoid taxes. They merely defer taxes by providing accelerated depreciation deductions. When the depreciation ends, the deferred taxes become payable.

Bennett required the consent of Baker's client. The Bennetts' accountants made an unsolicited telephone call to Baker's law office in New York from Alabama to request that Baker ascertain whether his client would consent. The client did.

In a second long distance call also initiated in Alabama by the Bennetts' accountants to Baker in New York, Baker approved, on behalf of his English client, a proposed form of assignmemt from Gibbs.

The Bennetts claim that there was a third telephone call from the Bennetts' accountants to Baker in New York during which J.R. Bennett had a 30 second conversation with Baker. The Bennetts contend that during this brief discourse Baker said that the purchase from Gibbs would give the Bennetts "a good tax shelter." Baker denies that there was any such conversation.[3]

[3]The Bennetts had not claimed that there was any such discussion prior to the trial, which they had ample opportunity to do in J.R. Bennett's deposition or in opposition to Baker's motion to dismiss for lack of jurisdiction.The Bennetts originally based their intentional fraud claim on a 31 page opinion Baker wrote to a third party, but the Bennetts dropped that claim because the opinion was written almost two years after J.R. Bennett's purchase from Gibbs. (C14, 27-57) At the point in the trial the alleged third telephone call was first asserted, the Bennetts needed something to avoid a directed verdict. J.R. Bennett's tardy testimony concerning the alleged 30 second telephone conversation was a convenient *deus ex machina*.

These telephone calls to Baker are the only contacts the Bennetts claim Baker had with Alabama in connection with the Gibbs and Bennett transaction. However, as is set forth below, the Alabama Supreme Court held there was a basis for personal jurisdiction over Baker by virtue of his representation of the English company from which Gibbs and his associate had purchased the computers six months earlier in a completely separate transaction.

Nine years after J.R. Bennett made his purchase from Gibbs, the Bennetts sued Baker in Alabama on the ground that the Internal Revenue Service ("IRS") had disallowed the tax deductions they had claimed.

The Bennetts advanced two theories in seeking a recovery from Baker. First was that Baker acted as their lawyer in advising them that J.R. Bennett was purchasing "a good tax shelter" and that Baker's opinion was erroneous and constituted professional malpractice. The Alabama trial court granted Baker a directed verdict dismissing that count.

Second, the Bennetts contended that Baker's 30 second telephone "opinion" constituted intentional fraud. Baker submitted to the trial court a 60 page memorandum of law demonstrating that, if he did express such an opinion, the opinion was correct. He showed further that if the Bennetts had appealed the ruling of the IRS, the Bennetts very

probably would have prevailed.[4]

The legal conclusions of Baker's memorandum of law were concurred in by an expert witness, James Holden, Esq., former president of the Tax Section of the American Bar Association. (R238-65, 279-83, 292) The Bennetts submitted no response to the 60-page memorandum.

The trial court, over Baker's protest, submitted the issue of the correctness of Baker's opinion to the jury, without giving the jury (a) a copy of the 60 page memorandum of law, (b) any instructions on the correctness of Baker's opinion, or (c) any instructions on applicable tax law.

The Alabama Supreme Court recognized that the trial court erred in submitting the issue of intentional fraud to the jury. Aside from the legal authorities showing that Baker's 30 second telephone "opinion," assuming that one really had been offered, was correct, there was not a shred of evidence that Baker had any doubt as to the correctness of the alleged "opinion," much less that he "knew" it to be

[4]The Bennetts had elected not to appeal the IRS' disallowances to the United States Tax Court or to pay the taxes and bring suit for recovery in a United States district court. Instead they worked out a settlement under which the IRS waived penalties and enhanced interest and left undisturbed accelerated depreciation deductions the Bennetts had claimed for two of the six years in dispute. (R-83, 93, 514, 578, 736-39) The settlement with the IRS left the Bennetts with a substantial net after tax profit on their purchase from Gibbs.

erroneous. The basis on which the Alabama Supreme Court nevertheless affirmed the judgment against Baker is one example of the extraordinarily partial treatment that the Bennetts received from that Court.

The Alabama Supreme Court held that, even though there was no evidence of any intentional misrepresentation or intentional omission to disclose relevant facts, the jury could have found Baker liable for innocent non-disclosure. (Opinion of the Alabama Supreme Court) (A-91-2).[5]

The holding that Baker was liable for such an innocent non-disclosure was a complete departure from prior decisions of the Alabama Supreme Court, which, until Baker's case, had followed the general common law rule that innocent non-disclosure is not a basis for liability for damages.

Since, prior to the Alabama Supreme Court's decision, the Bennetts had been asserting only intentional misrepresentation, there had been no concern as to the applicable law. All of the conceivably relevant jurisdictions --

[5]The "non-disclosure" was that in the alleged 30 second telephone "opinion" Baker had not set forth the supporting authorities; nor had he discussed distinctions he relied on from authorities the IRS might cite, which would be thoroughly analyzed in a full tax opinion. This contact was with a formal tax opinion by Baker to a different client, which was 31 single spaced pages in length.

Alabama, New York, Florida, and England -- do not differ with respect to liability for intentional misrepresentation. But once the Alabama Supreme Court changed Alabama law by imposing liability for innocent non-disclosure, the governing law question became critical.

Baker's innocent non-disclosure, if it occurred at all, took place in New York. The Bennetts incurred damages, if at all, in Florida, where they resided and paid taxes at the time the deductions were disallowed. The "center of gravity" of the transaction arguably was England, where the equipment was purchased, financed, leased, and located. The computers remained in England and there was never any intent to transport them to Alabama or anywhere else. Under the law of all three jurisdictions Baker would not have been liable for innocent non-disclosure.

Baker sought reargument but the Alabama Supreme Court declined to consider any law other than its own newly created Alabama liability for innocent non-disclosure.[6] (A-28)

[6]Refusal to consider the application of law of the relevant jurisdictions raises a serious constitutional question under the Full Faith and Credit Clause of the United States Constitution. It is not a mere error in choice of law. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981). See Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 15 n. 109 (1986).

Another respect in which the Alabama Supreme Court was inexplicably deferential to the Bennetts and their counsel was its tolerance of their use of bias and prejudice in argument to the jury. In closing argument, the Bennetts' counsel urged the Alabama jury to "stop lawyers in the biggest law firm in America,"[7] "New York lawyers," "from putting together abusive tax shelters," "costing the taxpayers 1.5 billion dollars a year." (R967, 977-978) Despite the persistent misconduct of the Bennetts' counsel in this regard, Baker's mistrial motions were denied.[8] (R977-78) The jury returned a general verdict in favor of the Bennetts for compensatory damages of $440,025[9] but awarded no

[7]Baker was counsel to Skadden, Arps, Slate, Meagher and Flom, not a member of the firm. At the time he became counsel to the firm, it had only 14 lawyers. It certainly was not the "biggest" in 1981, when Bennett made his purchase from Gibbs.

[8]In *New York Central R.R. Space Co. v. Johnson*, 279 U.S. 310, 318 (1929), this Court declared: "The public interest requires that the court of its own motion, as is its power and duty, protect suiters in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." Id. at 318 The plaintiff had referred to the defendant as an "eastern railroad," and declared that records and witnesses had been "sent on from New York" for the trial. See also *Viereck v. U.S.*, 318 U.S. 236 (1943).

[9]As noted earlier, under their settlement with the IRS the Bennetts had no actual damages. In fact, rather than merely breaking even, which would be the usual result in a deferral type of tax shelter, the Bennetts had a net after tax profit of approximately $45,000.

punitive damages. (A-63)

On appeal the Alabama Supreme Court held that Baker was not prejudiced by the pejorative references to him because the Bennetts' counsel used these arguments "primarily" in support of their punitive damages claim. Since the jury did not award punitive damages, the Court said, Baker was not prejudiced. (A-63)

The most egregious example of the favoritism that the Alabama Supreme Court showed to the Bennetts was its ruling that Baker was subject to the personal jurisdiction of the Alabama courts. The Court made that ruling *sua sponte* on a theory that totally disregards decisions of this Court that set constitutional limits on a state court's ability to exercise personal jurisdiction over non-residents. The *sua sponte* theory had not been asserted by the Bennetts in the trial court or on the appeal. Nevertheless, the Alabama Supreme Court denied Baker's motion for a rehearing, in which he proposed to demonstrate that the Court's *sua sponte* theory was constitutionally defective.

In his brief in the Alabama Supreme Court, Baker pointed out that a state's specific (or long arm) jurisdiction may be exercised only when the non-resident's alleged liability arises from the same forum contacts as provide the basis for jurisdiction. The alleged professional

malpractice and intentional misrepresentation on which the Bennetts based their claim (and the innocent non-disclosure for which the Alabama Supreme Court held Baker liable) occurred (if at all) in New York. Nevertheless, the Alabama Supreme Court *sua sponte* held that Baker was subject to personal jurisdiction in Alabama because he acted as attorney for his English client in connection with the sale to Gibbs. Baker's alleged liability to the Bennetts, however, did not arise from that earlier transaction, in which the Bennetts in no way were involved. (A48-49)[10]

The Bennetts never had claimed that the Alabama trial court had jurisdiction over Baker on the basis of the earlier transaction between the English seller and Gibbs. Accordingly the issue was not briefed or argued either in the trial court or in the briefs submitted to the Alabama Supreme Court. By deciding the issue *sua sponte* and then denying Baker any opportunity to point out the Court's error, the Alabama Supreme Court denied Baker a full and fair hearing on personal jurisdiction.

Baker's petition for certiorari to this Court to review the

[10]Baker never was in Alabama in connection with the Gibbs transaction either. He prepared the sales agreement in his New York office and transmitted execution copies to his client and Gibbs by mail.

Alabama Supreme Court's decision on personal jurisdiction was denied. *Baker v. Bennett*, ____ U.S. ____, 114 S. Ct. 1260, 122 L. Ed. 2d 658 (1993).

Baker first learned of the more than $100,000 of campaign contributions by the Bennetts' counsel to the election campaigns of justices of the Alabama Supreme Court from a newspaper article published seven months after the decision of the Alabama Supreme Court. The contributions therefore, were not in the record when Baker filed his earlier petition and, consequently, could not have been asserted at that time.

C. The Federal Questions Presented for Review By This Court Were Raised In The Florida Trial and Appellate Courts.

The Bennetts filed a copy of their Alabama judgment with the Clerk of Palm Beach County, Florida while the case was on appeal to the Alabama Supreme Court. Baker sought a declaration under the Florida Uniform Enforcement of Foreign Judgments Act, Fla. Stats. §55.501 through §55.509, that the Bennetts' Alabama judgment against him was void because the Alabama courts did not have personal jurisdiction over him. Since the Alabama Supreme Court had not then ruled, none of the federal questions now presented for review by this Court had yet arisen.

After the decision of the Alabama Supreme Court, the Bennetts moved for summary judgment, declaring that the decision had held that the Alabama Courts did have jurisdiction over Baker and that this was binding on the Florida courts under the Full Faith and Credit Clause. Baker responded that there could be no issue preclusion on jurisdiction under the Full Faith and Credit Clause, because he had not received a full and fair hearing in the Alabama Supreme Court on jurisdiction. (A-39)

Baker pointed out that the Alabama Supreme Court had decided jurisdiction *sua sponte* on a theory that had not been raised by the Bennetts either in the trial court or on appeal and that, therefore, had not been briefed or argued. The Alabama Supreme Court then denied Baker's motion for a rehearing so that he could show that the Court's *sua sponte* theory was contrary to decisions of this Court limiting the personal jurisdiction of state courts over non-residents. Consequently, Baker argued, he had not received the full hearing on jurisdiction in the Alabama Supreme Court that due process requires before the Full Faith and Credit Clause can be applied.

Baker declared in addition that the hearing in the Alabama Supreme Court was not fair because counsel for

the Bennetts contributed over $100,000 to the election campaigns of justices of that Court, which created at least an appearance of impropriety, further undermining any basis for Florida to give full faith and credit to the Alabama judgment. (A-42)

Baker argued also that summary judgment against him had to be denied because there are bona fide issues of fact as to whether there was actual impropriety in the Alabama courts, with respect to which Baker should be permitted to conduct discovery. The Florida trial court, however, without opinion, granted summary judgment dismissing Baker's complaint.

On appeal to the Florida Fourth District Court of Appeal, Baker raised the same points. That Court affirmed in an opinion that did not address Baker's contention that issue preclusion is inapplicable because of the appearance (and possible actuality) of impropriety resulting from (a) the contributions by the Bennetts' counsel of more than $100,000 to the election campaigns of Alabama Supreme Court justices and (b) the rulings of the Alabama Supreme Court that were extremely partial to the Bennetts.

With regard to the fullness of the hearing on jurisdiction, the Fourth District Court of Appeal declared that the Alabama Supreme Court did not deny Baker a full hearing

when it decided the issue on a theory it advanced *sua sponte* and which had not been argued or briefed, because an appellate court may affirm a correct decision of a trial court on a theory different from that of the trial court. (A-7) It did not consider the possible constitutional invalidity of the Alabama Supreme Court's *sua sponte* theory or that the Alabama trial court's assertion of jurisdiction over Baker could not have been sustained under any theory.

Baker unsuccessfully sought a rehearing, pointing out that the denial of a full hearing did not occur when the Alabama Supreme Court *sua sponte* propounded a novel theory that had not been briefed or argued. The denial of a full hearing occurred only subsequently, when the Alabama Supreme Court denied Baker an opportunity to show that the Court's *sua sponte* decision is contrary to decisions of this Court on jurisdiction and is constitutionally incorrect on any theory.

A petition requesting that the Florida Supreme Court exercise its discretionary jurisdiction must be accompanied by a brief "limited solely to the issue of the Supreme Court's jurisdiction."[11] Consequently Baker was prohibited from raising in the Florida Supreme Court the federal questions

[11]Rule 9.120(d), Fla. R. App. P.

now presented for review by this Court. The Florida Supreme Court declined jurisdiction without opinion.

REASONS FOR GRANTING THE WRIT

This petition raises four questions that are well worthy of consideration by this Court. The first is whether a litigant has received a fair hearing by an impartial tribunal for purposes of the Due Process and Full Faith and Credit Clauses when counsel for the other party has made very large contributions to the election campaigns of the judges who decided the case. That question is posed by this petition not merely in theory but in a graphic and compelling way because of the actual partiality of the Alabama Supreme Court reflected in a series of one sided rulings (a) that were either anomalous or constitutionally infirm or (b) that overturned previously settled law that would have mandated judgment in Baker's favor.

The Full Faith and Credit Clause bars a court in a second state from questioning whether the initial court decided the case correctly. A judgment rendered without due process of law is another matter. To give full faith and credit to such a judgment compounds the constitutional violation. In this case the Florida courts held that the Full Faith and Credit Clause prohibits a court which is asked to

enforce a judgment from considering whether the initial court violated other provisions of the Constitution, in particular, the due process requirement of a fair and impartial hearing. This Court should grant certiorari so that it can make clear that the Full Faith and Credit Clause does not override other provisions of the Constitution.

The supplement to this petition contains an excerpt from the American Judicature Society publication *Electing Justice: A Handbook of Judicial Election Reforms* 47-48 (1990) that sets forth six egregious examples of the pernicious influence of large election campaign contributions on judicial impartiality. This issue is likely to arise repeatedly, not only in Alabama but in other states in which judges are selected in partisan elections.[12]

The second issue raised by the petition is whether when there have been large campaign contributions, as in this case, the Full Faith and Credit Clause requires that the decision automatically be given issue preclusion effect. Or

[12]Seven states besides Alabama select all of their judges in partisan elections. They are: Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas and West Virginia. Twelve other states select only judges of original jurisdiction in partisan elections. American Judicature Society, *Electing Justice: the Law and Ethics of Judicial Election Campaigns*, Appendix A, 177 (1990).

does the Clause permit, or even require, an enforcing court to inquire into the impartiality of the rendering court and the fullness and fairness of the hearing accorded the litigant against whom the judgment is to be enforced?

Issue preclusion is by far the most perilous aspect of full faith and credit. It is rife with possible unintended consequences that can lead to a gross miscarriage of justice. Accordingly this Court has held that issue preclusion is applicable only when there has been a full and fair hearing on the issue to be foreclosed. This case provides an opportunity for a much needed elaboration of the requirements of a full and fair hearing under the Due Process and Full Faith and Credit Clauses of the Constitution.

The third issue raised by this petition relates to the fullness of a hearing as well as its fairness. Is a hearing full when a court *sua sponte* decides an issue of constitutional dimension on a legal theory that never was briefed or argued and then denies the losing party any opportunity whatsoever to show that the *sua sponte* decision was wrong? The Florida courts in this case have held that such a "hearing" is full for purposes of the Full Faith and Credit Clause of the United States Constitution, thereby leaving

Baker subject to the enforcement of a judgment of over $650,000 (including interest) even though he has *never* had a day in Court on the Alabama Supreme Court's flawed theory of personal jurisdiction over him. An interpretation of the Constitution that is so clearly contrary to common sense should not be permitted to stand.

Finally, the obverse of the first three issues is worthy of this Court's attention: Is it a denial of due process of law for a state court to apply issue preclusion under the aegis of the Full Faith and Credit Clause when there was not a full and fair hearing before any impartial tribunal on the issue sought to be precluded? Stated otherwise, to what extent does due process require an enforcing court to restrain its impulse to give full faith and credit until there is some form of inquiry into a claimed lack of bona fides in the judgment presented for enforcement?

The proper application of the Due Process and Full Faith and Credit Clauses in cases that present the issues set forth above requires guidance from this Court. At the moment there is room for considerable doubt as to what constitutes a fair and impartial rendering tribunal.

Similarly lacking is clarity as to the right and means available to a litigant -- particularly a non-resident -- to obtain a meaningful hearing in any forum in which the resulting judgment is presented for enforcement on whether the initial forum complied with constitutional standards. These are not matters on which the decision of the initial forum can be treated as conclusive for purposes of the Full Faith and Credit Clause. Just as no litigant can be a judge in his own case, no tribunal should be the final arbiter of its own fairness and impartiality.

POINT I

CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR OF THE FLORIDA COURTS IN GIVING ISSUE PRECLUSION EFFECT UNDER THE FULL FAITH AND CREDIT CLAUSE TO THE DECISION OF THE ALABAMA SUPREME COURT BECAUSE THE MORE THAN $100,000 THAT COUNSEL FOR THE BENNETTS CONTRIBUTED TO ELECTION CAMPAIGNS OF JUSTICES OF THAT COURT AND ITS ANOMALOUS RULINGS GAVE RISE TO AT LEAST AN APPEARANCE OF IMPROPRIETY.

Television has turned out to be such an effective medium for conducting an election campaign that few candidates for public office can succeed without it. The problem is that television time is so expensive that almost every candidate has an insatiable need for campaign contributions.

Some members of the House of Representatives must raise $1,000 every working day of their two year term towards their re-election campaigns. Senators have six years in which to fill their coffers but statewide campaigns are very costly. Thus some senators from populous states may have to raise as much as $10,000 every working day. As a result, political action committees with large sums to disburse have grossly disproportionate influence on legislation.

The framers of the United States Constitution insulated the federal judiciary from any such baneful influence by granting judges tenure during good behavior. Most state court judges, however, are elected. In Alabama the term of a Supreme Court justice is *six* years.[13]

The American Judicature Society, in a 1990 study entitled "Electing Justice: The Law and Ethics of Judicial Election Campaigns," said the following at page xiii of the preface:

[13]Forbes magazine, in its February 1, 1993 issue, reported that two Alabama Supreme Court justices who faced contested re-election campaigns in 1992 raised nearly $500,000 each. In its January 1, 1994 issue, Forbes reported that the Chief Justice of Alabama spent $670,687 in his most recent re-election campaign.

> California, Ohio and Texas have all seen multi-million-dollar races since 1986[14] and campaigns costing hundreds of thousands of dollars have arisen in states from Alabama to Montana. Even if big money does not corrupt the candidates, it gives an appearance that is especially troubling in the case of the judiciary.

The study adds:

> Lawyers are the biggest contributors to judicial races. These same lawyers then often appear before the judges they helped to elect. Even if these contributions do not prejudice the candidates in favor of the contributing lawyers, they give the public the appearance of prejudice.

This Court has held issue preclusion (and, therefore, the Full Faith and Credit Clause) to be inapplicable when there is reason to doubt the quality, extensiveness, or fairness of

[14]American Judicature Society: *Electing Justice*, 25 declares:

> In 1988, candidates for the six open seats on the Texas Supreme Court rasied over $10 million; candidates for the Chief Justice position alone raised almost $4 million. Two years earlier in California, three sitting justices spent nearly $4.5 million in an unsuccessful effort to retain their seats on the state Supreme Court; individuals and groups working against their retention spent another $7 million. Also in 1986, the two candidates for Chief Justice of the Ohio Supreme Court spent over $3 million.

For a very comprehensive study of judicial election campaign contribution abuses see Note, Disqualifying Elected Judges From Cases Involving Campaign Contributors, 40 Stan. L. Rev. 449 (1988).

the procedures followed in prior litigation. In *Allen v. McCurry*, 449 U.S. 90 (1980), the Court stated the restriction on the applicability of collateral estoppel (issue preclusion) as follows:

> But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. (Id. at 95.)

A year earlier in *Montana v. U.S.*, 440 U.S. 147, 164 n. 11 (1979), the Court did not require proof of actual unfairness but only "reason to doubt" the fairness of the prior proceeding.

The more than $100,000 that the Bennetts' lawyers contributed to the reelection campaigns of justices of the Alabama Supreme Court at a very minimum created an appearance of impropriety. Justices who had received generous contributions, and who would need such contributions again within six years, would be less than human if they were not tempted to tip the balance in favor of their benefactors.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court reversed a decision of the Supreme Court of Alabama in a case that would have been a precedent in another case that concerned the justices personally. The judgment reversed was against an insurance company for bad faith refusal to pay a valid health insurance claim. The jury awarded $3.5 million in punitive damages.

The Alabama Supreme Court affirmed in a 5 to 4 decision. The Justice who wrote the majority opinion had filed a class action on behalf of himself and all other Alabama state employees insured under a group policy with Blue Cross-Blue Shield of Alabama charging them with bad faith failure to pay claims. This Court held that it was not necessary to show that the Justice actually was influenced by his financial interest. The Court said:

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average * * * judge to * * * lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U.S., at 60 (quoting *Tumey v. Ohio, supra*, at 532). The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must

> satisfy the appearance of justice.'" (Id. at 825)

Baker's Florida action is not seeking to prevent enforcement of the Alabama judgment on the ground that it was procured by corruption. Such a claim would have imposed on Baker a very heavy burden of proof. What he is seeking is much simpler -- to prevent issue preclusion and the application of full faith and credit in Florida. For that purpose, Baker need only show that there was an appearance of impropriety (which is obvious in this case), not prove actual impropriety. See *Aetna Life Ins. Co. v. Lavoie, supra.*

The Florida courts did not permit Baker to investigate into, let alone get beyond, the appearance of impropriety. By granting summary judgment the Florida courts held *as a matter of law* not merely that appearance of impropriety is insufficient but that even establishing actual impropriety is irrelevant with regard to issue preclusion and, therefore, with regard to full faith and credit. This Court has ruled otherwise. *Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. U.S.*, 440 U.S. 147, 167 n. 11 (1979). Mere appearance of impropriety prevents issue preclusion and violates due process as well. *Aetna Life Ins. Co. v. Lavoie, supra.*

Clarification, therefore, is needed from this Court of an individual's right to question, before full faith and credit is accorded, the impartiality of the rendering tribunal and the fairness of the hearing it accorded.

This case involves more than large political contributions to judicial elections, which gave rise to an appearance of impropriety. The record shows that the Alabama Supreme Court actually tilted the scales of justice in favor of the Bennetts in a number of respects.[15]

The Bennetts, under Alabama law, had the burden of proof on personal jurisdiction. *Beasley v. Schuessler*, 519 So.2d 551 (Ala. Civ. App. 1987); *Tetco Metal Products, Inc. v. Langham*, 387 F.2d 721 (5th Cir. 1968). Yet the Bennetts introduced no evidence at the trial specifically related to personal jurisdiction over Baker. Nonetheless, the Alabama Supreme Court *sua sponte* strained to find jurisidiction over Baker in his role as counsel for his English client in the unrelated Gibbs purchase. When Baker sought to show that

[15]In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), in determining whether the impartiality of a judge might reasonably be questioned, this Court, considered the judge's controversial findings of fact even though the Court of Appeals had held there was enough evidence to support the trial court's findings. On the basis of its own review of the disputed findings, this Court held that the appropriate remedy was reversal thereby "allowing a new judge to take a fresh view of the issues." (Id. at 868).

this ruling transgressed the rulings of this Court, the Alabama Supreme Court denied him an opportunity to do so.

The Alabama Supreme Court also stretched to save the Bennetts even though they had not proved the intentional misrepresentation they alleged. In so doing the Alabama Supreme Court had to overturn two common law rules of law it had followed consistently in earlier cases. One is that a verdict must be set aside when a case is submitted to the jury over the defendant's objection on multiple theories and there is no evidence to support one or more of the theories.[16]

As was noted in the Statement of Facts at pages 9-11, the other departure from prior law in Baker's case was the holding that a defendant can be held liable for damages based on an innocent non-disclosure. Previous Alabama decisions had held, in accordance with the common law, that

[16]*Estes v. Nix*, 401 So.2d 62 (Ala. Civ. App. 1981), writ denied, 401 So.2d 64 (Ala. 1981); *American General Life Insurance Co. v. Lyles*, 540 So.2d 696 (Ala. 1989).

there is no liability for innocent non-disclosure.[17]

The Alabama Supreme Court tolerated misconduct by the Bennetts' counsel that went beyond constitutional limitations in appealing to regional prejudice. The Bennetts' counsel urged the Alabama jury to "stop lawyers in the biggest law firm in America," "New York lawyers," "from putting together abusive tax shelters," "costing the taxpayers 1.5 billion dollars a year." An impartial court would not have permitted that.

The Court completely ignored the likelihood that the Bennetts had actually benefited because the jury was influenced in finding liability and in its award of "compensatory" damages by the inflammatory arguments of Bennetts' counsel. Denying the common sense perception that prejudicial impressions of jurors cannot be so tightly compartmentalized, the Court declared that, since the jury refused to award punitive damages, Baker was not prejudiced. A comparable argument was rejected in *Pappas*

[17]Marshall v. Crocker, 387 So.2d 176 (Ala. 1980) (intent to suppress required); *Baker v. State Farm General Ins. Co.*, 585 So.2d 804 (Ala. 1991) (plaintiff must produce evidence of a present intent to deceive); At common law innocent non-disclosure is not even a ground for rescission. Restatement of Restitution §8, comment b. In any event, rescission could not have been granted in this case since Baker was not the seller.

v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992) (prejudicial evidence offered on contributory negligence may have influenced the jury to hold defendant was not negligent), and in *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520 (1931), this Court, in reversing a state court judgment, said:

> [N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent. (Id. at 521)

The more than $100,000 of campaign contributions and the exceptionally favorable treatment accorded to the Bennetts, at a minimum, raise a serious question of fact whether Baker received a fair and impartial hearing from the Alabama Supreme Court on jurisdiction.

This Court has held that due process of law requires trial by an impartial tribunal. A judge who needs large campaign contributions every six years could be tempted to conclude that impartiality is too expensive a luxury when one of the litigants is a generous contributor. If a judge has a direct or

indirect financial interest in the outcome of a case, it is not necessary to show that the judge was influenced. The mere possibility that he might be influenced is a denial of the due process right to an impartial tribunal. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), a judge had no personal interest in a case. He was merely a trustee of a university that had an indirect contingent financial stake in the plaintiff's success in the action. This Court ruled that this was sufficient to establish that the impartiality of the judge might be questioned.[18] The prospect of receiving needed future campaign contributions, by contrast, is a direct personal interest.

Whether any judges should be elected and how their campaigns should be financed are plainly political questions, and Baker is not seeking any ruling from this Court on them. The Constitution, however, requires impartiality and

[18] *Liljeberg* was decided under the Federal recusal statute, Title 28 U.S.C. §455, which provides provides in relevant part that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This is equivalent to this Court's "appearance of impropriety" criteria under the Due Process and Full Faith and Credit Clauses, which Baker maintains were disregarded by the Florida courts.

fairness in the decision making process by whatever process judges are chosen.

The first issue being presented is what constitutes an impermissible appearance of impropriety in the context of the Full Faith and Credit Clause?

The second question is as to a litigant's right to a hearing when he claims that a judgment was rendered against him without due process of law, for example, by an appearance of impropriety in the intitial court? If an enforcing court is *not* required to give full faith and credit to such a flawed judgment but, nevertheless, does so, is the enforcing court itself thereby violating the Due Process Clause? Those are questions that only this Court can answer.

POINT II

CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR OF THE THE FLORIDA COURTS IN FAILING, BEFORE GIVING FULL FAITH AND CREDIT TO THE ALABAMA JUDGMENT, TO ASCERTAIN WHETHER ALABAMA'S EXERCISE OF PERSONAL JURISDICTION OVER PETITIONER DENIED HIM DUE PROCESS OF LAW BECAUSE HE HAD NO CONTACTS WITH ALABAMA OTHER THAN UNSOLICITED TELEPHONE CALLS FROM ALABAMA TO HIM IN NEW YORK.

The Florida courts gave the Bennetts the benefit of preclusion under the Full Faith and Credit Clause of issues

that are neither mundane points nor of interest only to the Bennetts and Baker. They are constitutional issues that relate to whether the Alabama courts denied Baker due process of law in two fundamental respects.

The first was whether the Alabama courts denied Baker the most basic requirement of procedural due process -- an impartial tribunal (or at least one that did not have an appearance of impropriety). In this area, at least there is no conflict -- or gap -- between the Full Faith and Credit and Due Process Clauses. There can be no such thing as a hearing that fails to meet the requirements of due process but that is adequate for purposes of the Full Faith and Credit Clause. The Florida courts clearly erred in refusing to consider the due process, as well as the full faith and credit, questions raised by Baker.

The second issue on which the Bennetts' judgment was improperly given issue preclusion effect was whether the Alabama courts had personal jurisdiction over Baker, a Florida resident. This Court has held that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462,

471-72 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

Baker never was in Alabama. Baker's limited activities relating to J.R. Bennett's purchase from Gibbs took place in New York. He sent nothing into Alabama -- not even a single sheet of paper. Baker represented neither party to the sale from Gibbs to J.R. Bennett and he did not participate in any of the negotiations. He neither sought nor received any legal fee or other benefit from the transaction.

If Alabama can obtain jurisdiction over a non-resident merely because telephone calls were made to him from Alabama, suits may be brought against non-residents in distant forums without regard to "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Perhaps implicitly recognizing that the three telephone calls to Baker, standing alone, would not be a sufficient basis for exercising personal jurisdiction over him, the Alabama Supreme Court *sua sponte* held that Alabama had jurisdiction over Baker because he represented his English client in the earlier sale to Gibbs. That transaction, however, was completely independent of the sale by Gibbs to the

Bennetts. A partial resale by Gibbs was not contemplated at the time of Gibbs' purchase.

The Alabama Supreme Court did not specify whether it was holding that Alabama had general or specific jurisdiction over Baker. The Court's opinion contains no evidence that it took account of the different requirements for each. In any event, it is clear that neither existed.

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), this Court pointed out the critical distinctions between general and specific jurisdiction. When a claim does not arise out of the defendant's forum activities, an action may be maintained against him or her only if the court has general jurisdiction. That requires the defendant's forum activities to be continuous and systematic -- for example, regularly doing or soliciting business in the state.

Baker's role in the Gibbs purchase was not "a contact of a 'continuous and systematic' nature." Baker never went to Alabama. He was not a party to the sale, merely a lawyer representing an out-of-state client. Not even his client was present in Alabama. Baker drafted sale and leaseback agreements relating to equipment located in England in his New York office. His only contact with Alabama was sending the agreements there for signature on behalf of his

English client. Gibbs returned the partially executed agreements to New York to be forwarded for execution by Baker's client in England.

When the defendant's forum contacts are isolated and sporadic, the forum cannot assert long arm jurisdiction unless the claim sued on arose from his contacts with the forum state. Baker's only contacts with Alabama in connection with Gibbs' sale to J.R. Bennett were three unsolicited telephone calls from Alabama. The innocent non-disclosure for which he was held liable occurred (if at all) in New York. The professional misconduct and intentional misrepresentation which the Bennetts alleged in their complaint (but failed to prove) also would have occurred in New York.

If unsolicited interstate communication can be the basis for jurisdiction and the automatic application of forum law, an individual businessperson, doctor, or lawyer faces the prospect of having to defend, and being subject to local law, in every distant forum from which he or she received a telephone call, a facsimile transmission, or an electronic mail message.

This Court has held that state laws violate the Commerce Clause when they have the effect of inhibiting or

burdening interstate commerce. See, e.g., *Southern Pac. Co. v. State of Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). This Court said in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988):

> Nevertheless, state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny. (Id. at 894)

Permitting jurisdiction and choice of law to be based solely on unsolicited interstate telephone calls and possibly E-mail, fax transmission, or other forms of interstate communication dwarfs the burdens on interstate commerce in the cases cited. As early as *Davis v. Farmers Cooperative Equity Co.*, 262 U.S. 312 (1923), this Court recognized that subjecting a railroad to lawsuits in distant forums places an intolerable burden on interstate commerce in violation of the Commerce Clause. That Clause was applied to prevent the exercise of jurisdiction by states without regard to whether the Due Process Clause of the Fourteenth Amendment would have been applicable.[19]

[19]This Court said in *Davis*: "Since we hold that the Minnesota statute as construed and applied violates the commerce clause, we have no occasion to consider whether it also violates the Fourteenth Amendment." (Id. at 318)

In *Atchinson T. & S. F. Ry. Co. v. Wells*, 265 U.S. 101 (1924), this Court permitted a collateral attack on a judgment obtained in violation of the Commerce Clause even though the court that rendered the judgment had jurisdiction. Jurisdiction had been obtained by garnishing in a Texas court amounts owed to the Atchinson, Topeka & Santa Fe Railroad ("Santa Fe"). The garnishee objected to the jurisdiction, but its objection was overruled and judgment was entered in plaintiff's favor. Santa Fe sued in a federal court to enjoin enforcement of the judgment, a collateral attack. This Court said:

> Relief against the void judgments entered was properly sought by the Santa Fe in the federal court. (Citing cases.) The garnishment was void because seizure of the rolling stock and credits for the purpose of compelling the Santa Fe to submit to the jurisdiction of the Court in the Wells suit interfered unreasonably with interstate commerce. The Santa Fe was not obliged to assert its rights in the courts of Texas. (Id. at 103)

Surely the public's interest in avoiding unreasonable obstructions to and undue burdens on interstate communications is just as great today as its interest in avoiding obstructions or burdens on transporting goods was seventy years ago. If Alabama could exercise personal

jurisdiction because of unsolicited telephone calls from Alabama by the Bennetts' accountants made to Baker in New York, why would not a telephone call to an out-of-state lawyer or doctor (or any other citizen) from Atlanta, Dallas, or Los Angeles equally subject the recipient to suit in the courts of Georgia, Texas, or California? If so, could Georgia, Texas, or California then apply its own law to impose liability on the non-resident, who would not be liable under the law of the state in which he or she lives and works? The example differs only in a slight degree from what was done to Baker in Alabama. Florida further undermined the constitutional protection by refusing to examine the circumstances under which the Alabama decision was reached.

What the foregoing discussion demonstrates is a need for clarification by this Court of the respective domains of the Full Faith and Credit Clause and the Due Process provision of the Fourteenth Amendment. The Florida courts in effect have created a constitutional gap by failing to honor the dictate of the Due Process Clause and overzealously enforcing the Full Faith and Credit Clause. They have ruled that they must give full faith and credit to a judgment without regard to whether the judgment was obtained in violation of due process. The Florida courts have given

issue preclusion effect to a decision of a court that had every appearance of partiality, and they have denied Baker any opportunity to determine whether there was actual partiality.

This Court should grant certiorari so that it will have an opportunity to make clear that the Constitution does not leave an inexplicable discontinuity between full faith and credit and due process of law. Myopic application of Full Faith and Credit Clause must not be permitted to impair fundamental rights under the Due Process Clause.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Arthur R. Miller
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Tel.: (617) 495-4111

SUPPLEMENT

American Judicature Society, *Electing Justice: A Handbook of Judicial Election Reforms (1990) pages 47-8:*

- Within two days of filing suit against Texaco, Pennzoil attorney Joe Jamail gave $10,000 to the campaign fund of trial court judge Anthony Farris - the largest re-election contribution the judge had ever received. Even before Pennzoil was awarded a $10.3 billion judgment against Texaco, and all but $2 billion of the award was upheld by the Texas Court of Appeals, the parties and their attorneys began contributing to members of the Texas Supreme Court. In total, Pennzoil's lawyers gave more than $315,000 and Texaco attorneys contributed $73,000 to supreme court justices, three of whom were not even up for re-election. The Texas Supreme Court decided not to hear Texaco's appeal.

- In 1983 and 1984, attorneys contributed 43% ($272,679 of $639,222 total) of judicial campaign funds raised in California. California Supreme Court justices, who, unlike trial judges, do not face opponents, depended most heavily on attorneys for campaign funds (75%, compared to under 40% for

trial judges) and received the largest average contribution from individual lawyers ($959 compared to $428 for southern California and $216 for northern California trial judges).

- In 1986, Ohio Supreme Court Justice Frank Celebrezze received $350,000 of his $1.7 million war chest from labor unions, but lost the election due, in large part to reports that $10,000 came from union officials with ties to organized crime. The successful candidate, Thomas Moyer, was heavily supported by business; he received $50,000 from medical PACs alone. Shortly after Moyer assumed office, the court announced that it would rehear 30 cases decided in the last weeks of Celebrezze's term, but abandoned the plan when a Cleveland newspaper revealed that lawyers in 5 of the cases made large contributions to Moyer's campaign.

- Pennsylvania judge-elect Cunningham promised to "remember" a union official's "friends," in exchange for a cash contribution of $500 and the union's promises to pay her outstanding campaign debts and to support her husband's future campaign for judicial office. The union was a frequent litigant in the

judge-elect's court.

- Cook County, Illinois, attorneys have typically contributed more to judicial candidates who have run unopposed or who have already won the primary elections and were likely to win the general election, suggesting that these attorneys hoped to curry favor with judges.

- New York Supreme Court Justice Jerome D. Cohen (a trial judge) accepted below market-rate interest loans from a credit union to finance his judicial campaigns, knowingly allowed the credit union to apply the entire amount of his payments to principal with the result that he received interest-free loans for five years, and ordered nearly $250,000 in minors' funds to be deposited with the credit union even though no judge in his court had ever used a credit union as a depository.

High campaign costs and low profile elections make judicial candidates inordinately dependent on a small pool of contributors who do not represent the interests of the larger community -- lawyers, organizations that frequently litigate before the court (e.g., businesses and unions), and PACs. Candidates' dependence on these groups can create

the impression that justice is for sale, i.e., that judges will be unduly influenced by their supporters or will adopt the positions taken by their supporters. This impression is strengthened when contributions are large. Moreover, lawyers and litigants are the persons most likely to be approached for contributions. They are often unwilling to contribute, but feel they must in order to receive justice.

Supreme Court, U.S.
FILED

94 626 OCT - 5 1994

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

October Term 1994

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Arthur R. Miller
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Date: October 5, 1994

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Supreme Court of Florida

THURSDAY, JULY 7, 1994

LEON C. BAKER,	*	
	*	
Petitioner,	*	CASE NO. 83,671
	*	
v.	*	DISTRICT COURT
	*	OF APPEAL, 4TH
J. R. BENNETT, ET AL.,	*	DISTRICT NO.
	*	92-3150
	*	92-3494
Respondents.	*	
	*	
	*	
	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

GRIMES, C. J., SHAW, KOGAN and HARDING, JJ., AND MCDONALD, Senior Justice, concur

Respondent's Motion for Attorney's Fees is hereby denied.

SHAW, KOGAN and WELLS, JJ., and MCDONALD, Senior Justice, concur

GRIMES, C. J., OVERTON and HARDING, JJ., dissent

A True Copy BH

TEST:

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Dorothy Wilken, Clerk
Hon. Stephen A. Rapp, Judge
Hon. Thomas E. Sholts, Judge

Sid J. White
Clerk, Supreme Court

Mr. Kenneth W. Lipman
Mr. John T. Malhall, III

[SEAL]

By: Betsy Hull
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 1994

LEON C. BAKER, Appellant, v. J. R. BENNETT, and LAURA BENNETT, Appellees.	)	CASE NO. 92-3150 and 92-3495 L. T. CASE NO. CL 92-995 AG.
J. R. BENNETT and LAURA BENNETT, Appellants, v. LEON C. BAKER, Appellee.	)	CASE NO. 92-3205. L.T. CASE NO. CL 92-995 AG.

Opinion filed March 2, 1994

Consolidated appeals from the Circuit Court for Palm Beach County; Stephen A. Rapp and Thomas E. Sholts, Judges.

Kenneth W. Lipman of Siegal and Lipman, Boca Raton, for Leon C. Baker.

Arthur R. Miller, Pro Hac Vice, Cambridge, Massachusetts, for Leon C. Baker.

John T. Mulhall, III, of Rutherford, Minerley & Mulhall, P.A., Boca Raton, for J.R. Bennett and Laura Bennett.

OWEN, WILLIAM C., Senior Judge,

These consolidated appeals arise out of proceedings to domesticate a foreign judgment pursuant to the Florida Enforcement of Foreign Judgments Act, sections 35.501-55.509, Florida Statues (1991). We find no error and affirm the judgment and orders appealed.

J. R. Bennett and Laura Bennett (the "Bennetts") obtained an Alabama final money judgment against Leon C. Baker ("Baker"). The Bennetts filed and recorded a certified copy of the judgment with the Clerk of the Circuit Court of Palm Beach County as authorized by section 55.503, Florida Statutes. Baker moved to vacate the Alabama judgment on the ground that the Alabama trial court never obtained personal jurisdiction over him, and he also timely filed an independent action challenging the validity of the Alabama judgment on the identical ground.

While these matters were pending before the court below, the Supreme Court of Alabama rendered its decision in Baker v. Bennett, 603 So. 2d 928 (Ala. 1992), expressly upholding the Alabama trial court's conclusion that it had in personam jurisdiction over Baker. The court below, taking judicial notice of the records in the Alabama case, entered a final summary judgment[1] in favor of the Bennetts and, consistent herewith, denied Baker's separate notice to vacate the Alabama judgment.

Dispositive of Baker's appeals is this court's holding in the case of Baron v. Baron, 454 So. 2d 86 (Fla. 4th DCA 1984), wherein the court stated:

> Where a defendant makes a special appearance to challenge the jurisdiction of a court, and the court overrules the objection and determines that it does have jurisdiction, that decision . . . precludes collateral attack on the judgment, even though the ruling may have been erroneous on the facts or law. See 5 Am. Jur. 2d Appearance (1962). An aggrieved defendant must seek reversal in an

[1]Though the trial court's summary judgment does not so recite, it is evident that the trial court concluded that the issue of Alabama's in personam jurisdiction over Baker had been put to rest by the decision of the Alabama Supreme Court.

> appellate court of the state involved or, if he is unsuccessful there, in the Supreme Court of the United States. However, he cannot later attack the judgment on jurisdictional grounds if he does not avail himself of those remedies, or if the judgment is affirmed, or if the appellate court or the Supreme Court of the United States declines to consider the case. See Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931); see also Sherrer v. Scherrer, 334 U.S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429 (1948); Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 37 S. Ct. 492, 61 L. Ed. 966 (1917).

See also Dusesoi v. Dusesoi, 498 So. 2d 1348 (Fla. 2nd DCA 1986); Tipton v. Van Schouwen, 526 So. 2d 138 (Fla. 2d DCA 1988).

Baker argues that (a) the decision of the Alabama Supreme Court on the matter of Alabama's personal jurisdiction over him did not affect claim preclusion ("res judicata") but affected only issue preclusion ("collateral estoppel"), (b) the Full Faith and Credit Clause does not require issue preclusion ("collateral estoppel") to apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the

earlier case,[2] and (c) Baker did not have a full and fair opportunity to litigate in Alabama the issue of that state's personal jurisdiction over him because the Alabama Supreme Court sua sponte decided that issue on a theory entirely different from the theory presented in the trial court and argued on the appeal, and then, when Baker sought reconsideration, denied him the opportunity to be heard on the theory adopted by the court.

That Baker had full and fair opportunity to litigate the issue of Alabama's in personam jurisdiction over him cannot be denied - he, indeed, argued the issue extensively in both the trial and appellate courts of Alabama. We find unpersuasive his argument that the lack of opportunity to challenge the reasoning of the Alabama Supreme Court in reaching its decision equates to lack of opportunity to litigate the issue of jurisdiction.[3] The fact that the decision of that court may have been based on a legal theory neither briefed nor argued does not render the decision any less binding

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[2]Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L Ed. 2d 308 (1980).

[3]It is elementary that an appellate court is concerned with the correctness of the trial court's action and will affirm that action if there is any theory of law which will support it, whether argued or not.

under principles of issue preclusion than would be the case had the decision been erroneous on the facts or law, or been rendered without any written opinion whatever.

Whether the trial court of Alabama had personal jurisdiction over Baker was an issue squarely presented to the Alabama Supreme Court and that court has decided the issue correctly or not, adverse to Baker's contention. A foreign judgment is entitled to full faith and credit in Florida, even as to a question of the rendering court's jurisdiction, when that question has been expressly litigated and decided by the rendering court.[4]

The Bennetts' appeal is from an order quashing levy on certain property alleged to have been subject to writ of execution issued on the judgment. We find no error in that order and therefore affirm it.

AFFIRMED.

POLEN and KLEIN, JJ. concur.

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[4] Durfee v. Duke, 375 U. S. 106, 84 S. Ct. 342, 11 L. Ed. 2d 186 (1963). Haas v. Haas, 59 So., 2d 640 (Fla. 1952).

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

LEON C. BAKER

Appellant, Case No. 92-3150
92-3494

v.

J.R. BENNETT and LAURA BENNETT, L.T. CASE NO CL 92-995 AG

Appellees.

_____/

J.R. BENNETT and LAURA BENNETT,

Appellants, CASE NO. 92-3205

v. L.T. CASE NO. CL 92-995 AG

LEON C. BAKER,

Appellee.

_____/

MOTION FOR REHEARING

Appellant, Leon C. Baker ("Baker"), by his undersigned attorney, moves for a rehearing with respect to the Court's decision filed March 2, 1994. The grounds for

the motion are set forth below and in the accompanying brief in support of the motion.

It is ironic that the Court's decision in this case exemplifies how a sua sponte decision of an appellate court can deny an appellant a full hearing if reconsideration is refused.

The Court found "unpersuasive" Baker's argument that the lack of opportunity to challenge the reasoning of the Alabama Supreme Court on jurisdiction denied Baker a full and fair hearing on that issue. The Court cited no authority but reasoned in footnote 3 of its opinion:

> It is elementary that an appellate court is concerned with the correctness of the trial court's action and will affirm that action if there is any theory of law which will support it, whether argued or not.

The Court formulated this rationale sua sponte. The appellee did not make any such argument either in the Circuit Court or in this Court. Baker, therefore, did not brief or argue the point.

While the footnote is a correct statement of law as far as it goes, it falls far short of leading to the Court's conclusion. The issue in this case is not whether an

appellate court can decide a case on a ground different from that on which the trial court based its decision and different from any ground proposed by the parties. There is no question that the court can. The question is whether having done so, the court should afford the losing party an opportunity to show that the court erred.

What is unfair is to reach a decision on a basis which surprises counsel, and which was, therefore, not briefed or argued, and then to deny counsel an opportunity to show that the court com-mitted error. That is Baker's complaint with respect to the sua sponte decision of the Alabama Supreme Court and also his reason for seeking rehearing here.

If the Court denies Baker an opportunity to demonstrate this by calling relevant authorities in the accompanying brief to the attention of the Court, can it truly be said that he has had a full and fair hearing on issue preclusion?

At the oral argument one member of the panel suggested that if an appellate court sua sponte rests its decision on a ground which counsel did not brief or argue, the fault lies with counsel for the losing party, who failed to

anticipate that the point might arise. That may be true when the ground for a sua sponte decision is valid, or reasonably can be anticipated but not when it is both unprecedented and erroneous. No lawyer can be astute enough to anticipate all the erroneous theories which might be asserted against his client.

The Alabama Supreme Court held that the Alabama Circuit Court had jurisdiction over Baker on a legal theory which cannot be reconciled with any decision of the United States Supreme Court. Baker could not reasonably be expected to have anticipated that the Alabama Supreme Court would, on its own initiative, adopt a theory so out of line with settled constitutional principles enunciated by the United States Supreme Court. When the Alabama Supreme Court denied Baker any opportunity to show that the Court had erred, it denied him a full and fair hearing.

The Florida Enforcement of Foreign Judgments Act, F.S. 501.50 et seq. provides that before a foreign judgment can be enforced, the judgment debtor has thirty days in which to bring an action to challenge the validity of the judgment. The Florida legislature clearly did not wish foreign judgments to be conclusive against Florida residents

without regard to the circumstances under which they were obtained. Full faith and credit does not require that a judgment be given issue preclusion effect on a matter as to which there has not been a full and fair hearing. This Court should, as contemplated by the Florida Enforcement of Foreign Judgments Act, protect Baker, a Florida resident, from being bound on a constitutional law issue with regard to which he was denied a full and fair hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States mail upon RUTHERFORD, MINERLY & MULHALL, P.A., P. O. Box 81005, Boca Raton, FL 33481-0005, this 15th day of March 1994.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT JANUARY TERM 1994

LEON C. BAKER

Appellant,

Case No. 92-3150
92-3494

v.

J.R. BENNETT and LAURA BENNETT,

LT CASE NO CL 92-995AG

Appellees.

_____/

J.R. BENNETT and LAURA BENNETT,

Appellants,

CASE NO. 92-3205

v.

L.T. CASE NO. CL 92-995 AG

LEON C. BAKER,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, PALM BEACH COUNTY

APPELLANT'S BRIEF IN SUPPORT OF MOTION FOR REHEARING

Of Counsel:

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SUMMARY OF ARGUMENT

Appellant, Leon C. Baker ("Baker") seeks a rehearing on the ground that the Court's decision failed to address the determinative issue in this case: What constitutes a full and fair hearing?

That question is critical because appellees (the "Bennetts") invoked issue preclusion to prevent this Court from considering whether the Alabama court which rendered a judgment against Baker had the necessary personal jurisdiction over him. The Bennetts argued that this matter had been litigated in Alabama and, therefore, could not be reexamined in this Court. However, with regard to issue preclusion it is not sufficient that the issue have been litigated. There must have been a full and fair hearing.

It is clear that, as a matter of fact, Baker did not have a full and fair hearing. The essence of a full and fair hearing is that a party is permitted to support his position on every issue in dispute. After the Alabama Supreme

Court sua sponte advanced a novel - and by any standard completely erroneous - theory for holding that Alabama had personal jurisdiction over Baker, the Court refused him an opportunity to show that the theory is constitutionally deficient because it is contrary to decisions of the United States Supreme Court. From a lay point of view at least, Baker did not have a full and fair hearing on the Alabama Supreme Court's sua sponte theory.

Nevertheless, this Court held that the Alabama Supreme Court did not deny Baker a full and fair hearing, as a matter of law, because an appellate court may affirm a decision on a legal theory different from any the parties argued. An appellate court undoubtedly has such a right, but the conclusion the Court drew from it is a non sequitur. It is true that when an appellate court decides an appeal on a theory which the parties did not brief and argue, that is not in itself a denial of a full and fair hearing. The denial occurs only if the court refuses the losing party any opportunity to show that the court's opinion is erroneous.

Courts have recognized that an essential element of a fair hearing is a right of rebuttal. For example, redirect

examination is limited to the matters covered in cross examination because, in the absence of recross, there will be no chance of rebuttal. In the same vein, a reply brief may not raise new issues, which the appellee will have no opportunity to rebut. Similarly when a court decides a case on a new theory not briefed or argued by either party, for the hearing to be full and fair, the court must afford the losing party an opportunity to show that the court has erred. This is particularly imperative when, as in this case, the decision may be unconstitutional.

POINT I

WHEN A COURT DECIDES A CASE SUA SPONTE ON A THEORY NOT BRIEFED OR ARGUED BY THE PARTIES AND THEN DENIES REHEARING, THERE HAS NOT BEEN A FULL AND FAIR HEARING.

Appellate courts rarely decide cases sua sponte on a legal theory which the parties did not brief or argue. Under our adversary system, lawyers are highly motivated to ferret out all the legal issues in the lower court. It is important that they do so because of the general rule that an appellate

court will not consider any issue which was not presented to the court below. See, e.g., Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So.2d 306 (Fla. 4th DCA 1990), rev. den., 581 So.2d 165 (1991); Kozich v. Hartford Insurance Co. of Midwest, 609 So.2d 1471, 148 (Fla. 4th DCA 1992).

There are exceptions to that rule, of course, most notable being that an appellate court may affirm a correct decision of the lower court on a proper theory even though the lower court reached the result by erroneous reasoning. The fact that there is such an exception, however, does not foreclose a question as to whether the losing party has had a full and fair hearing when the losing party had no opportunity to show that the the theory which the court considered "proper" might be erroneous, let alone unconstitutional.

The issue in this case, the Court should note, is not whether, when an appellate court, reaches a decision sua sponte, it is duty bound to grant rehearing to the losing party, and the Court need not decide that question. The only issue here is whether such a sua sponte decision on which rehearing is denied should be given issue preclusion effect.

The classic statement of what constitutes due process in a hearing was articulated by Justice Brandeis, speaking for a unanimous Supreme Court, in American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231 (1932) at 287 U.S. 168:

> Due Process requires that there be an opportunity to present every available defense....

The Supreme Court made clear in that case that if a judgment is entered without a prior hearing meeting the requirements of due process, then due process requires that such a hearing must be granted after entry of judgment.

The Florida Supreme Court said in Ryan's Furniture Exchange v. McNair, 120 Fla.109, 162 So.483 (1935) at 162 So.487:

> In observing due process of law, the opportunity to be heard must be full and fair, not merely colorable or illusory.

In Robinson v. Malik, 135 So.2d 445 (Fla.3d DCA 1961), the plaintiff sued for partition and the defendant filed a counterclaim to quiet title and for damages. After the plaintiff had put on his case and before the defendant completed the presentation of her case, the Court declared

it was ready to rule and permitted no further evidence by the defendant or rebuttal by the plaintiff. In holding that the plaintiff was deprived of due process of law, the 3d District Court of Appeal said at 135 So.2d 445:

> It is apparent from this record that the final decree goes beyond the issues framed in the pleadings and beyond the proof adduced. Therefore, it is a clear departure from the requirements of due process of law, particularly when the plaintiff was not permitted to have his day in court in defense of the cross-claim.

In Atkins v. State, 136 Fla. 596, 187 So. 363 (1939), the Circuit Court of Calhoun County gave the respondent eight hours to respond to a writ of mandamus. The respondent sought several addi-tional days to prepare a proper response. The court extended the respondent's time for only an additional 26 hours. At the end of the 26 hours the respondent requested five additional days "to have a reasonable opportunity for such a hearing." The Court denied the request "for the reason that the Court is familiar with the law involved in the case and finds that further hearing and argument is unnecessary." In reversing, the Supreme Court said at 187 So.365:

> The haste with which the case was disposed of amounted to a denial of due process of law because respondent was not allowed a sufficient time to adequately prepare his defense.

As in Robinson v. Malik and in Atkins v. State, supra, the Alabama Supreme Court proceeded on the basis that it "knew" the constitutional requirements for long arm jurisdiction without any input on the Court's sua sponte theory from Baker's counsel. The cases cited above make clear that Baker did not receive a full and fair hearing in the Alabama Supreme Court on the issue of juris-diction. That tribunal's unilateral and constitutionally erroneous conclusion - as to which it denied Baker any opportunity to point out the error - cannot be a basis for issue preclusion.

POINT II

THE QUESTION IN THIS CASE IS ONE OF ISSUE PRECLUSION. THE COURT ERRED IN RELYING ON CASES INVOLVING CLAIM PRECLUSION.

Claim preclusion applies whether or not there were issues which could have been litigated but were not. The

situation is entirely different when the question is issue preclusion. There can be no issue preclusion unless the precise issue was fully and fairly litigated.

Baron v. Baron, 454 So.2d 86 (Fla. 4th DCA 1984), which the Court cited as "dispositive" of Baker's appeals, was not an issue preclusion case but a claim preclusion case. The husband in that case sued in Florida for dissolution of the marriage after the wife had sought the identical relief in a New Hampshire divorce action. The husband claimed he had never been served in New Hampshire, but the New Hampshire court ruled against him and granted the wife a divorce. The husband did not appeal. Divorce was the relief claimed in both New Hampshire and Florida. The decree in New Hampshire granting a divorce precluded another suit on the claim for divorce in Florida.

Moreover, the husband in Baron did not contend, as Baker does here, that he did not receive a full and fair hearing in the earlier action.

Accordingly Baron is not a precedent for this case for two reasons: (1) It involved claim preclusion, not issue preclusion. (2) No question was raised with respect to the fullness or fairness of the determination that there was jurisdiction of the husband in the New Hampshire action.

Dusesoi v. Dusesoi, 498 So.2d 1348 (Fla.2d DCA 1986), cited by the Court, is inapplicable for the same reasons. In that case, as in Baron, both spouses sought a divorce, the wife in Florida and the husband in Texas. It again was a case of claim preclusion, not issue preclusion. Furthermore, as in Baron, there was no contention that the hearing on jurisdiction in Texas was not full and fair.

Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.

2d 186 (1963), was also a claim preclusion case and again there was no issue as to the fairness of the hearing in the earlier case.

Tipton v. Van Schouwen, 526 So.2d 138 (Fla. 2d DCA) 1988, in contrast to Baron, Dusesoi and Durfee, was an issue preclusion case. There was no claim, however, that the defendant had been denied a full and fair hearing in Texas. On the contrary, the defendant had requested a hearing on jurisdiction in the Texas court but then failed to appear at the hearing. It was the defendant's own fault that he did not receive a full hearing on jurisdiction in Texas. The case is clearly not a precedent here.

Haas v. Haas, 59 So.2d 640 (Fla. 1959), involved issue preclusion but there was no contention that the respondent had been denied a full and fair hearing. As in Tipton, the Court had granted the respondent a hearing, but he did not take advantage of the opportunity to present his case.

The criteria for the application of claim preclusion are less stringent than those for applying issue preclusion. Claim preclusion puts an end to litigation on a particular

claim. Issue preclusion is applied when there will be further litigation in any event on a different claim. Refusal to apply issue preclusion does not reopen a closed case. It opens only a single issue on which there has not been a full and fair hearing. The Restatement (Second) of Judgments declares in comment j to Section 28:

> But whether or not relief from the first judgment may be obtained, the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding.... [C]onfined within proper limits, discretion to deny preclusive effect to a determination under the circumstances stated is central to the fair administration of preclusion doctrine.

CONCLUSION

This Court should grant rehearing on the question of whether Baker received a full and fair hearing on the issue of jurisiction in the Alabama Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States mail upon RUTHERFORD, MINERLY & MULHALL, P.A., P. O. Box 81005, Boca Raton, FL 33481-0005, this 15th day of March 1994.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P. O. BOX 3315, WEST PALM BEACH, FL 33402

LEON C. BAKER

Appellant(s),

vs.

J. R. BENNETT and LAURA BENNETT

Appellee(s).

CASE NO. 92-03150
92-03205 92-03494

L. T. CASE NO CL 92-995 AG
PALM BEACH

April 8, 1994

BY ORDER OF THE COURT:

ORDERED, that Appellant's motion filed March 15, 1994, for rehearing is hereby denied.

I hereby certify the foregoing in a true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Kenneth W. Lipman
Dorothy H. Wilken, Clerk
John T. Mulhall, III

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR
PALM BEACH COUNTY, FLORIDA

CONSOLIDATED CASE NO.: CL-92-995 AG

_____X

LEON C. BAKER,

Plaintiff,

-against-

J.R. BENNETT AND
LAURA BENNETT,

Defendants.
_____X

AFFIDAVIT IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

BEFORE ME, the undersigned authority, personally appeared Leon C. Baker, who after being by me duly sworn deposes and says of his personal knowledge that:

1. I am the plaintiff in this action and the facts set forth in this affidavit are based upon my personal

knowledge except where otherwise indicated.

A. The Issue Here is Issue Preclusion Not Claim Preclusion.

2. As set forth in detail below and in the accompanying memorandum of law, the motion of the defendants ("the Bennetts") for summary judgment must be denied for one or the other of two alternative reasons. (a) If the Bennetts admit the facts alleged in this affidavit, the motion must be denied as a matter of law, because res judicata is inapplicable and the Alabama court which rendered the judgment against me did not have jurisdiction. (b) If the Bennetts deny the facts set forth in this affidavit, then the motion must be denied because it raises material issues of fact as to what the Alabama Supreme Court actually decided.

3. In either event, it is essential that the Court keep in mind that the type of res judicata which the Bennetts are invoking in this case is issue preclusion (sometimes called "collateral estoppel") rather than claim preclusion (sometimes called "bar" or "res judicata" in a narrow sense). The accompanying memorandum of law shows that the difference is vital, because issue preclusion

applies only to matters which have been fully and fairly litigated. As I show below, the matters which the Bennetts claim are res judicata were not fully and fairly litigated. Accordingly there can be no issue preclusion as to those matters. They remain open to re-examination by this Court, and upon re-examination, it is clear that the Alabama courts did not have jurisdiction to render a judgment against me.

4. Issue preclusion is the relevant principle in this case rather than claim preclusion, because the cause of action I am suing on is different from the causes of action on which the Bennetts sued me in Alabama. I am proceeding here under the Florida Enforcement of Foreign Judgments Act, F.S. §55.509, to contest the jurisdiction of the court which rendered the Alabama judgment that the Bennetts have filed with the Clerk of this Court. The Bennetts sued me in Alabama on three counts. The first was for legal malpractice. The other two counts were for intentional fraud.[1] The other two counts were for

[1]The Alabama trial court granted my motion for a directed verdict dismissing the professional malpractice count.

intentional fraud.[2]

Because the Bennetts sued on different causes of action from the one I am suing on in this case, only issue preclusion is involved here.

B. Neither the Preliminary Proceedings in Alabama Nor the Alabama Supreme Court Are Res Judicata.

5. The Bennetts cite as conclusive that the Alabama trial court had jurisdiction over me two preliminary determinations (one by the Alabama trial court and the other by the Alabama Supreme Court denying a writ of mandamus) and a determination on appeal by the Alabama Supreme Court. The accompanying memorandum of law shows that none of those proceedings has any issue

[2]The Bennetts failed to prove their claims for intentional fraud. The Alabama Supreme Court held, nevertheless, that even in the absence of any evidence of intentional fraud, I could be held liable for innocent misrepresentation or innocent nondisclosure. (See the opinion of the Alabama Supreme Court attached to defendants' motion as Exhibit F, pages 12 through 14.) Alabama's application of its own law to hold me liable for conduct in New York for which New York would not impose liability raises another due process issue, which was not fully and fairly litigated in Alabama. See paragraphs 24 - 26 below and Point III of the accompanying Memorandum of Law.

preclusion o other res judicata effect.

6. The decision of the alabama trial court that it had jurisdiction is no res judicata for three reasons: (a) It was tentative only; the Bennetts still had the burden of proving at the trial that the Alabama Circuit Court had jurisdiction.[3] (b) The decision of the Alabama Circuit Court was interlocutory and not appealable. (c) The decision of the Alabama Circuit Court was made on the basis of conflicting affidavits not after an evidentiary hearing. As the accompanying memorandum of law shows, the preliminary determination would be given no res judicata effect in Alabama and can be given no greater effect in this Court.

7. The denial by the Alabama Supreme Court of my application for a writ of mandamus has no res judicata effect because the issuance of such a writ is discretionary. The Alabama Supreme Court gave no reason for the denial,

[3]The Bennetts offered no evidence on jurisdiction at the Alabama trial. They sought to remedy this on the appeal to the Alabama Supreme Court by citing the materials they had presented on the preliminary motion, but the Supreme Court properly did not to any extent rest its decision on what had been submitted on the preliminary motion.

and there is no evidence that the Alabama Supreme Court considered the jurisdiction issue on the merits.

C. Issues the Alabama Supreme Court Left Undecided.

8. The Bennetts' third ground for claiming res judicata, the decision of the Alabama Supreme Court, similarly has no preclusion effect but for different reasons. My appeal to the Alabama Supreme Court on the issue of the trial court's personal jurisdiction over me presented two questions of constitutional law, one under the 14th Amendment and one under the Commerce Clause of the United State Constitution. The Alabama Supreme Court did not decide either of them.

9. Instead the Court held that the trial court had jurisdiction over me on a ground that had not been asserted in the trial court. Consequently it had not been briefed or argued by the parties on the appeal to the Alabama Supreme Court.

10. The opinion of the Alabama Supreme Court also raised for the first time, but did not decide, an issue

under the Full Faith and Credit Clause of the United States Constitution. It did so by applying Alabama law to events which occurred, if at all, in New York.

11. Since the Alabama Supreme Court raised these two issues for the time on the appeal without giving the parties an opportunity to present relevant legal authorities, these issues were not fully and fairly litigated and the decision of the Alabama Supreme Court can have no issue preclusion effect.

12. I made an application for rehearing to the Alabama Supreme Court, in which I sought a hearing on the two new issues raised by the Court's decision. My application was denied. Accordingly for a second time I was denied a hearing on those questions.

D. The Two Submitted Issues The Alabama Supreme Court Did Not Decide.

13. This lawsuit arose out of a purchase in June 1981 by defendant j.R. Bennett ("Bennett") of an interest in computer located in England from Donald Gibbs, an American resident, who is not a party to this action (or to the disputes between the parties). Defendant Laura Bennett

is the wife of J.R. Bennett and filed joint federal income tax returns with him.

14. Six months earlier the seller, Gibbs, and an associate, Johnny West, purchased the computers from two of my clients, Atlantic Computer Leasing, p.l.c. ("Atlantic"), an English computer leasing company, and its Netherlands affiliate. At the time I was practicing law in New York, and I was the lawyer for these two European companies in the sale to Gibbs and West.

15. When Gibbs resold half of his interest to Bennett, my relation to the resale consisted of the following:

(a) In response to a telephone call initiated by Bennett's accountants in Alabama to my law office in New York, I ascertained that my clients, would consent to the sale of part of Gibbs' interest to J.R. Bennett.

(b) In a second long distance telephone call initiated in Alabama by Bennett's Alabama accountants to my New York law office, I approved, on behalf of my clients, the proposed from of assignment from Gibbs to Bennett.

(c) A copy of the executed assignment from Gibbs to Bennett was received by me in New York, and I then transmitted it to my clients in England and the Netherlands.

I represented neither party to the transaction between Bennett and Gibbs, and I sought no compensation in connection with any of the above and I received none.

16. Bennett claims that there was a third long distance telephone call from his accountants in Alabama to me in New York, during which Bennett was handed the telephone and had a 30 second conversation with me. According to Bennett, I said that the purchase from Gibbs would give the Bennetts "a good tax shelter."

17. Bennett in his pretrial deposition gave an entirely different version of this conversation. He said it occurred several months **after** his purchase from Gibbs and that he and I were discussing a different proposed computer transaction, for Bennett's corporation and not for Bennett himself. I deny that there was any prepurchase conversation between Bennett and me, but solely for purposes of the

appeal to the Alabama Supreme Court, I conceded that it occurred.[4]

18. These facts raised two constitutional law issues which were addressed in my briefs to the Alabama Supreme Court but the Court did not decide them. The first of these is whether three unsolicited telephone calls from Alabama to me in New York could be the basis for long arm jurisdiction over me. The accompanying memorandum of law shows that Alabama's assertion of personal jurisdiction over me based on these telephone calls violated the Due Process provision of the Fourteenth Amendment of the United States Constitution.

19. It is unclear from the decision of the Alabama Supreme Court whether the Court disagreed with my

[4]The Bennetts did not allege any prepurchase conversation in their Alabama complaint and they did not cite it as a contact with Alabama in opposing my motion to dismiss on the ground that the Alabama court lacked personal jurisdiction over me. Bennett id not testify in his pre-trial deposition that there was any such conversation; nor did the Bennetts claim there was any prepurchase conversation in papers they filed opposing my motion for summary judgment. The accountant who placed the call to me did not testify that there was any such conversation. The first mention of this alleged prepurchase conversation was by Bennett at the trial.

argument or whether it agreed that the telephone calls were insufficient to give the trial court jurisdiction. In any event, the Court did not mention the telephone calls in its opinion and held that the trial court had jurisdiction on an entirely different theory (discussed in paragraphs 20 and 21 below).

20. An alternative and completely independent issue raised by Alabama's assertion of jurisdiction over me based on the three unsolicited telephone calls from Alabama to me in New York arose under the Commerce Clause of the United States Constitution. The issue is whether a state's exercise of jurisdiction on the basis of interstate transmission of information is an impermissible burden on interstate commerce. The accompanying memorandum of law shows that there are United States Supreme Court precedents which require a holding that the Commerce Clause has been violated. The memorandum shows also that a valid Commerce Clause objection would make the Alabama judgment void and subject to collateral attack even if there were no violation of due process. The Alabama courts, however, did not rule on this matter, and it remains open for decision here.

E. The Two Constitutional Issues On Which The Alabama Court Denied Me A Hearing Which Were, Therefore, Not Litigated.

21. Having passed over the Due Process and Commerce Clause issues raised by the assertion of jurisdiction on the basis of the three unsolicited interstate telephone calls, the Alabama Supreme Court held that the trial court had jurisdiction on a theory which the parties had not raised in the trial court or briefed on the appeal. The Court held that representation of my European clients in connection with the earlier Gibbs and West purchase was sufficient to give the Alabama trial court jurisdiction over me on claims arising out of Gibbs' resale of half his interest to Bennett. The Alabama Supreme Court did not specify whether it was holding that the trial court had general jurisdiction or specific (long arm) jurisdiction. The accompanying memorandum of law shows that the requirements of neither were met. Since the effect of my participation in the Gibbs and West transaction had not been briefed on the appeal I sought a rehearing, but it was denied.

22. If the Alabama Supreme Court had granted me a hearing, I would have been bound by its decision even though the Court clearly erred. The Alabama Supreme Court, however, reached its decision on this point without any input from the parties and it then denied my application for rehearing, so there was no hearing at all on the matter. Consequently, there can be no issue preclusion.

23. The holding on jurisdiction was not the only matter the Alabama Supreme Court decided with no input from the parties, thereby denying me a hearing. Although the Alabama case was tried on an intentional fraud theory, the Alabama Supreme Court affirmed on an entirely different theory. It recognized that there was no evidence of any intentional misrepresentation or intentional omission to disclose relevant facts, but the Court held nevertheless that the jury could have found me liable for innocent misrepresentation or innocent nondisclosure.

24. Since the Bennetts had been asserting only intentional misrepresentation and intentional suppression, there had been no dispute at the trial over the applicable law. The laws of Alabama, New York, Florida, and England do not differ with respect to liability for intentional fraud.

25. But once the Alabama Supreme Court sua sponte changed the Bennetts' claim by holding me liable for innocent misrepresentation or nondisclosure, rather than for intentional misrepresentation or nondisclosure, the governing law became critical. Alabama law differs from that of the other jurisdictions in allowing for recovery of damages for innocent misrepresentation and innocent non-disclosure. Accordingly, once the Alabama Supreme Court shifted the focus away from intentional fraud to innocent misrepresentation or innocent nondisclosure, it was necessary to consider what law was applicable.

26. My innocent misrepresentation and innocent nondisclosure, if they occurred at all, took place in New York. The "Center of gravity" of the transaction was England, where the equipment was purchased, financed, leased and located. The computers remained in England and there was never any intent to transport them to Alabama.

27. The Alabama Supreme Court declined to consider any law other than its own. As the accompanying memorandum of law shows, that was a violation of the Due

Process Clause of the Fourteenth Amendment as well as a violation of the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution.

F. The Limited Hearing Baker Received Was Tainted By Prejudice and Possible Corruption.

28. Aside from the fact that the Alabama Supreme Court denied me any hearing at all on the four constitutional issues in the case, there are serious questions of fact and law as to whether the entire proceeding in the Alabama Supreme Court was so unfair as to constitute a violation of due process. The proceeding was grossly unfair in two separate respects.

29. In closing argument, the Bennetts' counsel urged the Alabama jury to 'stop lawyers in the biggest law firm in America," "New York lawyers," "from putting together abusive tax shelters," "costing the taxpayers 1.5 billion dollars a year." Despite the persistent misconduct of the Bennetts' counsel -- even after the judge warned him that she would declare a mistrial if he continued to employ improper tactics -- my motions for a mistrial were denied.

30. On appeal the Alabama Supreme Court held that I was not prejudiced by these pejorative references to me because the Bennetts' counsel used prejudicial arguments "primarily" in support of the punitive damages claim. Since the jury did not award punitive damages, the Court said, I was not prejudiced.

31. The accompanying memorandum of law shows that the United States Supreme court has not countenanced such appeals to regional prejudice.

32. Even more unfair, the records of the Alabama Secretary of State disclose that counsel for the Bennetts contributed at least $100,000 to the election campaigns of justices of the Alabama Supreme Court, including $50,000 for the just completed election.

33. Whether the Justices of the Alabama Supreme Court were influenced by these campaign contributions is an issue of fact which can not be resolved on a motion for summary judgment. (This, of course, will be in addition to any issues of fact that will be raised if the Bennetts deny the facts set forth above which show that there was no hearing on the issues as to which the Bennetts claim res judicata.

34. However, the appearance of impropriety is undeniable. As the accompanying memorandum of law shows, there is a denial of due process of law when judges may have a pecuniary reason to favor one of the litigants. It is not necessary to show that the judges were actually influenced.

_____
Leon C. Baker

Sworn to before me this
18th day of November 1992.

Debra Sauer
Notary Public

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1992

1910384

Leon C. Baker

v.

J. R. Bennett and Laura Jean Bennett

Appeal from Madison Circuit Court
(CV-89-384)

STEAGALL, JUSTICE.

Leon Baker appeals from a judgment entered pursuant to a jury verdict for J. R. Bennett and his wife Laura Jean Bennett.

The Bennetts sued Baker, a tax attorney from New York; S. David Johnston, their personal accountant; and Johnston's accounting firm, alleging conspiracy to defraud, negligence, and malpractice. The Bennetts claimed that the defendants had fraudulently induced them to invest in an improper tax shelter and that the fraud resulted in their

payment of over $700,000 to the Internal Revenue Service ("IRS") in back taxes and interest.[1] Baker answered the Bennetts' complaint and asserted, among other things, that service of process was defective. Upon Baker's motion, the trial court quashed the purported service on Baker and gave the Bennetts 30 days to file an alias summons and complaint. The Bennetts complied; however, the record is silent as to whether service was ever completed. The Bennetts filed a second alias summons and complaint, which was properly served upon Baker. Baker filed a motion to dismiss, alleging that the trial court lacked personal jurisdiction over him; this motion was denied. Baker then petitioned this Court for a writ of mandamus to vacate the trial court's judgment on that motion, and this Court denied the writ. Baker subsequently filed a second answer to the Bennetts' complaint, and the Bennetts amended their complaint twice in response to the defenses raised.

Baker filed two motions for summary judgment, and both were denied. During the course of the subsequent jury trial, Baker moved for a directed verdict on all claims against him; his motion was granted as to the malpractice claim. The jury returned a general verdict against Baker for

[1]The Bennetts' claims against Johnston and Johnston's accounting firm were settled; neither of those defendants is a party to this appeal.

$440,025 in compensatory damages and no punitive damages. Baker moved for a judgment notwithstanding the verdict or, in the alternative, a new trial or a remittitur; that motion was denied by operation of law. Baker appeals.

The record reveals that the Bennetts owned a large interest in River Oaks Industries, a mobile home manufacturing business for which J. R. Bennett served as president and chief executive officer. Johnston was the Bennetts' personal accountant, as well as an advisor for many of the Bennetts' business interests. Baker was a business acquaintance of Johnston. J. R. Bennett had met Baker briefly in 1980 during a business meeting unrelated to this case.

In late 1980, the Bennetts were having difficulty paying the large income tax assessments on their successful mobile home manufacturing business. Because the Bennetts sought to continue expanding the business and needed to maximize their cash flow, Johnston suggested that they invest in computer leasing as a tax shelter. Six months earlier, two of Johnston's clients had entered into a computer leasing arrangement recommended to Johnston by Baker. The clients had purchased computers and peripheral equipment from Atlantic Computer Leasing (hereinafter "Atlantic") for $4,128,473. Atlantic, an English corporation, is a large

supplier of computer systems and specializes in arranged leases.

Baker had set up several of these transactions for Atlantic and had arranged the following plan involving two of Johnston's clients: IBM sold computers and equipment to two British entities, which entered into a leaseback arrangement with Atlantic. Atlantic then transferred the computers and equipment to Carena, Inc., its Dutch subsidiary, which resulted in tax advantages for the company due to certain provisions of Dutch tax law. Carena sold the equipment through a non-recourse mortgage to Coleman Leasing Corporation, an intermediary entity set up by Baker for this purpose. Baker was the sole stockholder in Coleman Leasing and was, in fact, its attorney. The two clients then purchased the computers and equipment from Coleman Leasing for $586,034. Their interest was subject to the non-recourse mortgage of $3,629,039 held by Carena on its initial purchase of the computers from IBM; however, the clients had no personal obligation to pay this mortgage. The clients paid a total of $100,000 in cash, with the remainder to be paid in escrow to Coleman Leasing according to a 10-year structured payment schedule. From these funds, Baker was required to disburse the monthly payment on the principal due to Carena as well as fees for Carena's broker

and his own legal fees. After executing the purchase agreement with Coleman Leasing, the clients immediately leased the computers back to Atlantic for a 10-year period. The amount of the clients' monthly purchase payment to Coleman Leasing was equal to the amount of Atlantic's monthly lease payment to them, so that no money actually changed hands each month. Under this arrangement, the clients could defer a certain amount of income tax for accelerated depreciation of the computers and for deduction of interest on indebtedness incurred for acquisition of the computers. At the end of the 10-year lease period, Atlantic would have the option to repurchase the computers and equipment for a nominal amount, then sell them to less-developed countries that have a need for older model computers. This residual value of the computers is Atlantic's primary source of profit in computer leasing transactions.

Baker represented Atlantic in the lease arrangement with the two clients and prepared the contracts and promissory note documents necessary to execute the relationship between Atlantic, Carena, Coleman Leasing, and the clients. The clients were required to make their monthly payments to Atlantic through Coleman Leasing.

Don Gibbs, one of the two clients, subsequently sold

his business and no longer needed the full amount of tax deferral generated by the computer leasing arrangement. Johnston then offered a one-half share of Gibbs's interest to the Bennetts, who were initially hesitant to invest in the rather complex transaction. Although he was unfamiliar with all the intricacies of the shelter, Johnston urged the Bennetts to invest and even lent them most of the "up front" money that was necessary for them to do so. Johnston told the Bennetts that they would have to report as income the rents received from Atlantic on the equipment, but that the depreciation of the equipment over the first five years would far exceed this income and would be reported as a loss. The Bennetts could then, he said, defer payment of taxes equal to that loss. Johnston also told the Bennetts that Baker would defend him before the IRS if there were ever any problems with the leasing arrangement. The Bennetts thereafter purchased a one-half share of Gibbs's interest in the computers for $1,315,938, with payments to be made to Gibbs each month.

The Bennetts took state and federal tax deferrals relating to the transactions in their returns for 1981 through 1983. During those years, River Oaks Industries was being audited. In early 1985, prior to the filing of the Bennetts' 1984 tax return, the IRS notified the Bennetts that their

personal tax returns would be audited. The Bennetts were represented at the audit by one of Johnston's associates in his accounting firm. At the end of the initial audit in 1985, the IRS informed the Bennetts that it was challenging the validity of the computer leasing, but that it would not go forward on the matter until a decision was rendered in Coleman v. Commissioner, 87 T.C. 178 (1986), affirmed, 833 F.2d 303 (3d Cir. 1987), a case pending before the United States Tax Court at that time. Coleman involved a similar computer leasing tax shelter that had been set up by Baker, using Coleman Leasing as the intermediary. Baker was defending the taxpayer in Coleman.

Johnston discussed the audit with the Bennetts and advised them to do nothing until Coleman was decided. Johnston expressed great confidence in Baker's ability to win the case and assured the Bennetts that there was nothing to worry about. Accordingly, the Bennetts included the deferrals from the computer leasing deal in their 1984 tax returns, which were then added to the audit. The Bennetts retained a different accounting firm to prepare their returns in 1985 and 1986. Upon the advice of Gary Joyce, a member of Johnston's accounting firm, the Bennetts' new accounting firm also included deferrals for the computer leasing in their tax returns for those years.

In a letter dated August 24, 1987, the IRS informed the Bennetts that the computer leasing deal was an "abusive" tax shelter. Specifically, the IRS determined that the computer equipment had been grossly overvalued, giving rise to inflated and fictitious losses. The IRS also questioned whether the computers and equipment ever actually existed, because the documentation relating to the computer leasing transaction did not contain serial numbers for the machinery. Based on these findings, the IRS assessed the Bennetts' back taxes, interest, and penalties totaling $1,200,000 for 1981 through 1984. The Bennetts immediately attempted to contact Baker in New York, but were unable to do so.

After retaining counsel, the Bennetts settled their state tax debt for $42,411.29 and their federal debt for $758,783.56. The IRS dropped its claim for penalties, because it determined that the Bennetts had relied on their advisors in investing in the computer leasing deal.

Baker raises several issues concerning the merits of the Bennetts' fraud claims against him; however, we first address his challenges to several procedural aspects of the case. Baker argues that the Bennetts' fraud claim is barred by the applicable statute of limitations as a matter of law and that the trial court erred in submitting the issue to the jury.

Under Ala. Code 1975, § 6-2-3, fraud actions are considered to have accrued upon the discovery by the aggrieved party of the facts constituting the fraud. Generally, the question of when a party discovered or should have discovered those facts so as to begin the running of the statutory period of limitations is one properly left to the jury. Hicks v. Globe Life & Accident Insurance Co., 584, So.2d 458 (Ala. 1991). The issue may be taken from the jury and decided as a matter of law only in cases where the plaintiff actually knew of facts that would put a reasonable mind on notice of fraud. Hicks, supra.

Based on the Hicks principle, Baker argues that the Bennetts' claim could have accrued at one of three different times: (1) when they received notice of the IRS audit in 1985, (2) when the IRS gave notice in 1986 that it intended to disallow the computer leasing venture as a tax shelter, or (3) when the Coleman decision, which involved similar facts and the same type of shelter, was issued in 1986.

The first letter from the IRS that the Bennetts received did not indicate that the computer transaction was suspect, nor was it an assessment for the deductions taken on the transaction. It was merely notice of the pending audit, and the Bennetts turned the matter over to Joyce. There is evidence that the Bennetts knew in 1985 that the

tax shelter might come under scrutiny; however, the record does not indicate that the Bennetts had grounds to suspect an underlying fraud at that point. Johnston and Joyce repeatedly assured them that the shelter would be upheld and continued to include the deferrals and deductions under the tax shelter in the Bennetts' 1984 and 1985 tax returns. The Bennetts thereafter retained new accountants to prepare their taxes and included the benefits of the tax shelter in their returns for those years.

The Bennetts had no contact with Baker during this period, but were "guaranteed" by Johnston that the Coleman case would be resolved favorably and thereby would eliminate any doubts the IRS might have about the legitimacy of the tax shelter. The Bennetts did not know the details and intricacies of Coleman, and there is no evidence to indicate that they should have. The Bennetts did not graduate from high school and have no experience in tax or legal matters. In view of this fact, it does not appear unreasonable that the Bennetts would rely on the expertise and assurances of their accountant during the audit.

The record shows that the Bennetts did not know until 1987 that Coleman Leasing was controlled by Baker, that the computers and equipment might not exist at all, and that the value of those goods might have been grossly

overvalued. It is those elements that formed the basis of the Bennetts' claims against Baker, not the mere knowledge that their returns were being audited or that the tax shelter could be disallowed. Upon their discovery of facts pertaining to Coleman Leasing and the valuation of the computers themselves, the Bennetts filed a timely complaint. In view of this, we conclude that the Bennetts did not have actual knowledge of the alleged fraud until 1987, within two years of the filing of the complaint. Whether they should have discovered the fraud earlier was an issue properly submitted for the jury's determination. Hicks, supra.

Baker next argues that the Bennetts' action should not be deemed to have been filed in October 1988, because he was not served with process until July 1990. An action is not "commenced for purposes of the statute of limitations if it is not filed with the bona fide intention of having it immediately served." Mace v. Centel Business Systems, 549 So.2d 70 (Ala. 1989). Generally, the claim may be barred where the plaintiff has manifested a lack of intent to serve the defendant promptly after filing. Thompson v. E. A. Industries, Inc., 540 So.2d 1362, citing Ward v. Saben Appliance Co., 391 So.2d 1030 (Ala. 1980) (statute of limitations not complied with where plaintiff requested a delay in service of process after filing complaint). See, also,

Pettibone Crane Co. v. Foster, 485 So.2d 712 (Ala. 1986) (failure to provide address of defendant was manifest evidence of intent not to promptly serve process).

The record shows that all other defendants in this case were served with process promptly after the filing of the complaint and that service was attempted on Baker. The service of process was sent by mistake to a law office located next to Baker's office in New York, and Baker testified at trial that a secretary in that office received it. Baker immediately acted upon this process by retaining counsel, who filed an answer and appeared at a deposition taken in 1989. He also filed a motion to quash service, which resulted in Baker's being properly served by a specially appointed process server. These facts certainly do not indicate any manifest lack of intent to promptly serve notice upon Baker; thus, we find no merit in this argument.

Baker next argues that the judgment against him is void because the trial court lacked in personam jurisdiction. In personam jurisdiction is proper if the defendant has such contacts with the state that maintenance of the suit does not offend traditional notions of substantial justice. Alabama Waterproofing Co. v. Hanby, 431 So.2d 141 (Ala. 1983). A party has sufficient contacts with the state of Alabama when that person, acting directly or by agent, is or may be

personally responsible as a consequence of that person's transacting business in this state. A.R.Civ.P. 4.2(a)(2)(A). The primary inquiry regarding personal jurisdiction is whether a defendant could have reasonably anticipated that the effects of his acts would be felt by the plaintiff in Alabama. Duke v. Young, 496 So.2d 37 (Ala. 1986).

The record shows that as an agent for Atlantic and as president of Coleman Leasing, Baker intentionally sent documents to this state to be executed by residents here, that he obtained promissory notes from Alabama residents that were payable at Alabama banks, that he mailed numerous items related to the computer lease transaction to this state, and that he accepted over $580,000 in cash payments from Alabama residents for Coleman Leasing. It is obvious that the repercussions of these acts would be felt by the Alabama residents involved; thus, we find no error in the trial court's conclusion that it had in personam jurisdiction over Baker.

We now turn to consider Baker's challenges to the merits of this case. He first contends that the trial court erred in denying his motion for a directed verdict on the Bennetts' claims of intentional fraud and suppression. At trial, the Bennetts emphasized that the monthly payments they made to Gibbs for his share in the tax shelter were

directed to Coleman Leasing. They claimed that Coleman Leasing was set up for Baker's own profit, with built-in kickbacks to Johnston. They further claimed that Baker and Johnston knowingly created a sham tax shelter and conspired to involve the Bennetts in the scheme in order to pump money into Coleman Leasing. They argued that both Johnston and Baker were guilty of suppressing material facts that would have led to the discovery of the purported fraud, and they accused Baker and Johnston of intentionally misleading them as to the facts underlying the leasing venture.

To prove suppression of a material fact, a plaintiff must establish (1) that the defendant had a duty to disclose that fact, (2) that the defendant concealed or failed to disclose that fact, (3) that the concealment or failure to disclose induced the plaintiff to act, and (4) that the action caused injury to the plaintiff, Ala. Code 1975, § 6-5-102. See, also, Gary v. Kirtland, 514 So.2d 970 (Ala. 1987). Section 6-5-102 does not require proof of an intent to deceive; rather, a breach of the defendant's duty to disclose the suppressed facts is sufficient to trigger liability. Burlington Northern R.V. v. Warren, 574 So.2d 758 (Ala. 1990). Under § 6-5-102, a duty to disclose arises either from a confidential relationship between the parties or from the

particular facts and circumstances of the case. The question of the existence of a duty to communicate under § 6-5-102 is for the jury, which should consider the relationship of the parties, the value of the particular facts suppressed, and the relative knowledge of each party. Lowder Realty, Inc. v. Odom, 495 So.2d 23 (Ala. 1986). Where the defendant had superior knowledge of the suppressed fact and the defrauded party has been induced to take action that otherwise might not have been taken, the obligation to disclose is particularly compelling. Dominick v. Dixie Nat'l Life Ins. Co., 809 F.2d 1559 (11th Cir. 1987).

In this case, there is no substantial evidence of a confidential relationship between Baker and the Bennetts that would give rise to a duty to disclose the facts underlying the computer leasing venture. However, the record shows that the Bennetts talked to Baker briefly by telephone in 1985, when they were in Johnston's office deliberating over whether to buy into the computer leasing venture. In that conversation, Baker stated that computer leasing was a "good tax shelter," but he did not reveal any of the underlying facts of the operation. It is undisputed that Baker had superior knowledge of the actual value of the computers and of the role of Coleman Leasing in the arrangement and also knew that these factors could be

critical if the IRS questioned the tax shelter. It is likewise undisputed that the Bennetts relied on Baker and Johnston's expertise in entering into the venture.

In view of these facts, we cannot say that the trial court erred in submitting the issue of suppression to the jury. A directed verdict is proper only where there is a complete absence of proof on a material issue or where there are no disputed questions of fact on which reasonable people could differ. National Security Fire & Casualty Co. v. Vintson, 454 So.2d 942 (Ala. 1984). Here, there was evidence relating to the elements of fraud under § 6-5-102, and much of it was highly controverted; thus, Baker's motion for a directed verdict was properly denied.

Likewise, we hold that the trial court did not err in failing to direct a verdict against the Bennetts' claim of fraudulent misrepresentation under § 6-5-101. Before a claim under this section may be submitted to the jury, the plaintiff must establish four elements of fraud: (1) a false representation (2) concerning a material existing fact (3) relied upon by the plaintiff (4) who was damaged as a proximate result. Cherokee Farms, Inc. v. Fireman's Fund Ins. Co., 526 So.2d 871 (Ala. 1988). A false representation, even if made by mistake or innocently, is a legal fraud and this section applies, entitling a plaintiff to compensatory

damages. Morgan v. South Central Bell Tel. Co., 466 So.2d 107 (Ala. 1985). Where the evidence reasonably affords an inference that the plaintiff was defrauded by the misrepresentation, the case is one for the trier of fact. Hartselle Real Estate & Ins. Co. v. Atkins, 426 So.2d 451 (Ala.Civ.App. 1983).

Baker argues that the representation he made to the Bennetts, i.e., that computer leasing was a good tax shelter, was not false at the time he gave it in 1981. At that point, the Coleman case had not been decided and the shelter had not been disallowed. Baker also correctly points out that the mere statement of an opinion is usually not a representation of material fact upon which an action for legal fraud can be based, particularly when there is no evidence of an intent to deceive. Reynolds v. Mitchell, 529 So.2d 227 (Ala. 1988). However, the Bennetts did not base their claim of misrepresentation solely on Baker's opinion of the tax shelter. The Bennetts also alleged that Baker first misrepresented the amount of money that would be directed through Coleman Leasing and then misrepresented the actual and residual value of the computers involved in the transaction. The record shows that the Bennetts' scheduled payments to Gibbs were channeled through Coleman Leasing for disbursal to Carena and the underlying parties

in the transaction. Baker sharply disputed the impropriety of any of these disbursals, but was unable to produce a complete record of the money he allocated as the attorney in fact and sole shareholder of Coleman Leasing. Moreover, an expert witness for the Bennetts testified that the value of the computers was considerably less than Baker reported it to be. While this testimony was rebutted with detailed evidence from Baker concerning the true value of the equipment, it was sufficient to create an inference of fraudulent misrepresentation.

Baker next argues that the trial court erred in failing to give certain jury instructions regarding the issues of suppression and material misrepresentation. The record shows that during the trial, the Bennetts' counsel sought to establish that Baker "pocketed" the funds paid into Coleman Leasing and that the underlying transaction was a sham. During closing argument, the Bennetts' counsel asked the jury to "Stop lawyers in the biggest law firm in America" and "New York lawyers" from putting together abusive tax shelters. Baker's counsel objected to these comments when they were made, and the trial court sustained the objections and gave curative instructions.

In a fraud case, counsel is given broad leeway in arguing the merits and is allowed in closing argument to

comment on all proper inferences from the evidence based on his own reasoning. Seaboard Coastline R.R. v. Moore, 479 So.2d 1131 (Ala. 1985). When an objection to an improper comment during argument is sustained and the trial court instructs the jury to disregard the remark, the test on appeal is whether the comment was so prejudicial that its effect was not or could not be eradicated from the minds of the jurors. Harrison v. Woodley Square Apartments, 421 So.2d 101 (Ala. 1982).

In this case, Baker insists that the statements made by the Bennetts' counsel inflamed the jury and resulted in an unreasonably high verdict. However, the statements in question were made primarily in counsel's attempt to win an award of punitive damages for the Bennetts. The fact that the jury declined to award even a small amount of punitive damages indicates that the statements made by the Bennetts' counsel did not unduly prejudice their minds against Baker. We therefore find the statements not so inflammatory as to warrant a new trial.

Baker next argues that the jury's award of $440,025 in compensatory damages was unsupported by the evidence and is, thus, due to be overturned. He contends that this amount was computed based on the amount of taxes the Bennetts were required to pay to the IRS. Baker points out

that the tax benefit to be gained from the computer transaction was a deferral, not a deduction, and that the Bennetts would have had to pay taxes to the IRS in any event. However, the amount of taxes paid to the IRS by the Bennetts is not the only element the jury could have considered in making its award. As previously discussed, there was evidence that the Bennetts paid an inflated amount for computer equipment that was grossly undervalued and then lost the residual value of the equipment. At trial, counsel for the Bennetts vigorously argued that this evidence should be a primary element in the jury's award of damages.

In reviewing a jury verdict, this Court must determine whether the evidence, viewed in the light most favorable to the plaintiff, was so preponderantly against the verdict as to be plainly and palpably wrong and unjust. Christiansen v. Hall, 567 So.2d 1338 (Ala. 1990). After examining the evidence contained in the record, we cannot say that it is so entirely against the verdict as to constitute plain error; therefore, in accordance with our narrow standard of review, we must affirm the jury's determination of this issue.

The judgment entered by the trial court pursuant to the jury verdict is due to be affirmed.

AFFIRMED.

Hornsby, C. J., and Maddox, Shores, Adams, Houston, Kennedy, and Ingram, JJ., concur.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
September 4, 1992

1910384

Leon C. Baker v. J. R. Bennett and Laura Jean Bennett

County: Madison Circuit Court No.: CV-89-384J

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

STEAGALL, J. - Hornsby, CJ., Maddox, Shores, Adams, Houston, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 4th day of September, 1992.

S/Robert G. Esdale
Clerk, Supreme Court of Alabama

55.501 Florida Enforcement of Foreign Judgments Act; short title. — Sections 55.501-55-509 may be cited as the "Florida Enforcement of Foreign Judgments Act."

55.502 Construction of act. —

(1) As used in ss. 55.501-55.509, the term "foreign judgment" means any judgment, decree, or order of a court of any other state if such judgment, decree, or order is entitled to full faith and credit in this state.

(2) This act shall not be construed to impair the right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this act.

(3) This act shall be interpreted and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.

(4) Nothing contained in this act shall be construed to alter, modify, or extend the limitation period applicable for the enforcement of foreign judgments.

55.503 Recording and status of foreign judgments, fees. —

(1) A copy of any foreign judgment certified in accordance with the laws of the United States or of this state may be recorded in the office of the clerk of the circuit court of any county. The clerk shall file, record, and index the

foreign judgment in the same manner as a judgment of a circuit or county court of this state. A judgment so recorded shall have the same effect and shall be subject to the same rules of civil procedure, legal and equitable defenses, and proceedings for reopening, vacating or staying judgments, and it may be enforced, released, or satisfied, as a judgment of a circuit or county court of this state.

(2) Any person recording a foreign judgment shall pay to the clerk of the circuit court a service charge as is required for the recording of an original action demanding the relief or judgment granted in the foreign judgment.

55.505 Notice of recording; prerequisite to enforcement.

(1) At the time of the recording of a foreign judgment, the judgment creditor shall make and record the clerk of the circuit court an affidavit setting forth the name and last known post-office address of the judgment debtor and of the judgment creditor.

(2) Promptly upon the recording of the foreign judgment and the affidavit, the clerk shall mail notice of the recording of the foreign judgment, by registered mail with return receipt requested, to the judgment debtor at the address given in the affidavit and shall make a note of the mailing in the docket. The notice shall include the name and

post-office address of the judgment creditor and of the judgment creditor's attorney, if any, in this state. In addition, the judgment creditor may mail a notice of the recording of the judgment to the judgment debtor and may record proof of mailing with the clerk. The failure of the clerk to mail notice of recording will not affect the enforcement proceedings if proof of mailing by the judgment creditor has been recorded.

(3) No execution or other process for enforcement of a foreign judgment recorded hereunder shall issue until 30 days after the mailing of notice by the clerk. When an action authorized in s. 55.509(1) is filed, it acts as an automatic stay of the effect of this section.

55.507 Lien; when effective — A foreign judgment does not operate as a lien until 30 days after the mailing of notice by the clerk. When an action authorized in s. 55.509(1) is filed, it acts as an automatic stay of the effect of this section.

55.509 Stay of enforcement of foreign judgment —

(1) If, within 30 days, after the date the foreign judgment is recorded, the judgment debtor files an action contesting the jurisdiction of the court which entered the foreign judgment or the validity of the foreign judgment and

records a lis pendens directed toward the foreign judgment, the court shall stay enforcement of the foreign judgment and the judgment lien upon the filing of the action by the judgment debtor.

(2) If the judgment debtor shows the circuit or county court any ground upon which enforcement of a judgment of any circuit or county court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

(3)

SUPREME COURT, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

No. 94-626

IN THE

Supreme Court Of The United States

October Term 1994

LEON C. BAKER,

Petitioner,

v.

J. R. BENNETT AND LAURA BENNETT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

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Date: November 11, 1994

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QUESTIONS PRESENTED

1. Whether the judgment of the Alabama Supreme Court was entitled to full faith and credit in Florida where (i) the issue of personal jurisdiction over petitioner had been fully and fairly decided by the Alabama Supreme Court and (ii) this Court had previously declined to review such issue.

2. Whether this Court should review factual allegations regarding political contributions to Justices of the Alabama Supreme Court where there is no evidence in the record to support such allegations.

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No. 94-626

IN THE

Supreme Court Of The United States

October Term 1994

LEON C. BAKER,

Petitioner,

v.

J. R. BENNETT AND LAURA BENNETT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

Respondents J. R. and Laura Bennett respectfully request that this Honorable Court deny the petition for writ of certiorari seeking review of the opinion and judgment of the Fourth District Court of Appeal of the State of Florida. The decision of said Fourth District Court of Appeal is not yet reported and is set forth beginning at page A-3 of the Appendix to the petition.

STATEMENT OF THE CASE

A. Nature of the Case

The petition is from a decision of the Fourth District Court of Appeal of the State of Florida (the "Fourth District Court") arising out of proceedings to domesticate a judgment of the Alabama Supreme Court pursuant to the Florida Enforcement of Foreign Judgments Act, Sections 35.501-55.509, Florida Statutes (1991). See A-4. The Fourth District Court held that the Alabama judgment was entitled to full faith and credit in Florida.

Petitioner argued in the Fourth District Court that the Alabama judgment was not entitled to full faith and credit because the courts of Alabama lacked personal jurisdiction over him. To the contrary, as the Fourth District Court stated:

> That Baker had full and fair opportunity to litigate the *issue* of Alabama's in personam jurisdiction over him cannot be denied - he, indeed, argued the issue extensively in both the trial and appellate courts of Alabama. . . .
>
> Whether the trial court of Alabama had personal jurisdiction over Baker was an issue squarely presented to the Alabama Supreme Court and that court has decided the issue correctly or not, adverse to Baker's contention. A foreign judgment is entitled to full faith and credit in Florida, even as to a question of the rendering court's jurisdiction, when that question has been expressly litigated and decided by the rendering court.

A-7-8.

The question of Alabama's personal jurisdiction over Baker was also previously urged upon this Court in 1992 as a reason for granting certiorari. This Court denied

Baker's petition for certiorari. *Baker v. Bennett*, ____ U.S. ____, 113 S.Ct. 1260, 122 L.Ed.2d 658 (1993).

B. Statement of the Facts[1]

The Alabama judgment which has been domesticated in Florida affirmed a judgment of the Circuit Court of Madison County, Alabama, entered pursuant to a jury verdict of fraud in favor of the respondents, J. R. and Laura Bennett (the "Bennetts"), and against petitioner Leon C. Baker ("Baker'). (C 785-786).

Baker argued at length in both the trial and appellate courts of Alabama that Alabama could not constitutionally exercise personal jurisdiction over him. The record in the underlying case in Alabama was over 3,000 pages long. From its review of this extensive record, the Alabama Supreme Court found that: (i) Baker intentionally sent documents to Alabama to be executed in Alabama by Alabama residents; (ii) Baker obtained promissory notes from Alabama residents that were payable at Alabama banks; (iii) Baker mailed numerous items related to the transaction to Alabama; and (iv) Baker accepted over $580,000 in cash payments from Alabama residents in connection with the transaction. 603 So.2d 928, at 934.

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[1]Portions of the Florida record are reproduced in the Appendix to the petition. The record in the Alabama courts has two parts, the reporter's record, a transcript of the trial proceedings and the clerk's record, pleadings, motions, and other documents, including depositions, filed in the case. Citations to pages of the Alabama transcript are preceded by R (e.g., R32) and to the clerk's record by C (e.g., C34). Petitioner's Alabama exhibits are preceded by P (e.g., P21) and Respondents' Alabama exhibits are preceded by D (e.g., D4). There is no appendix to this brief, but citations to the appendix to the petition are preceded by A (e.g., A-21).

The Alabama Supreme Court held that these facts were sufficient to support personal jurisdiction over Baker. Baker previously sought review in this Court of this ruling on the question of personal jurisdiction. This Court denied certiorari. *Baker v. Bennett, supra.*

Baker's statement of facts in his present petition again relates primarily to the issue of personal jurisdiction. His statement that he had no contacts with Alabama other than unsolicited phone calls to him in New York is a blatant falsehood. In addition to the facts relating to jurisdiction previously noted, Baker ignores a plethora of other contacts he had with Alabama. At any rate, it is unnecessary for this Court to reexamine the record in the Alabama case. The Alabama Supreme Court found ample contacts upon which to base jurisdiction over Baker, and this Court previously declined review.

Baker also makes extensive arguments in his statement of facts that are wholly unsupported by the record. Petitioner's allegations that campaign contributions by respondents' attorneys corrupted the judicial process are based solely on (i) his hearsay affidavit, (ii) an article from *Forbes* magazine which is not in the record, and (iii) a supplement to the petition which is likewise not record evidence.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari is frivolous and should be denied.

The reasons urged for granting the writ can primarily be boiled down to two. First, petitioner argues that the courts of Alabama did not have *in personam* jurisdiction over him and that he was not given a full and fair opportunity to contest jurisdiction. To the contrary, as the Fourth District Court found, Baker argued the issue of personal jurisdiction vigorously in both the Alabama trial

and appellate courts [see *Baker v. Bennett*, 603 So.2d 928 (Ala. 1992), *cert. denied*, ____U.S. ___, 113 S.Ct. 1260, 122 L.Ed.2d 658 (1993)]. Moreover, Baker previously presented the very same issue to this Court in 1992. In fact, Baker's present petition is almost entirely duplicative of his 1992 petition. Whole passages are lifted verbatim from the prior petition. See Baker's Petition for Writ of Certiorari to the Supreme Court of Alabama, No. 92-932, October Term 1992. This Court denied Baker's 1992 petition. The issue of personal jurisdiction should have been finally laid to rest at that time. It is a patent abuse of this Court's processes for Baker to once again raise this issue.

Notwithstanding the above, Baker again urges the absence of personal jurisdiction. Baker just couches the argument this time in the context of the Full Faith and Credit Clause rather than the Due Process Clause. But this case is simply a classic example of the enforcement of a sister state's money judgment, where the personal jurisdiction issue was raised and litigated in the first state (Alabama). It is well-established that the courts of Florida may not constitutionally permit Baker to relitigate his case through this subsequent attempt to attack the merits of the Alabama judgment collaterally. This Court should once more decline review.

Second, Baker, without any record support, argues that respondents' counsel made "very large contributions to the election campaigns of the judges who decided the case." Pretermitting the question of whether this Court should concern itself with whether states should elect judges and how those election campaigns should be financed, there is absolutely no evidence in the record to support such an inquiry. Petitioner includes in the Appendix to the petition his personal, hearsay affidavit that such contributions were made, a vague, unsupported reference in the petition to an article from *Forbes* magazine

and a supplement to the petition which is not in the record. If, after the case was decided, Baker had discovered evidence that the Justices of the Alabama Supreme Court were somehow corrupted, under the law of Alabama, he could have filed a motion for relief from the judgment in the Alabama court. He did not do so. Under these circumstances, even were the Court inclined to grant review on this essentially political question, there is not a sufficient record to warrant review in this case.

Baker's contentions regarding the jury arguments of respondents' counsel ignore both the prompt curative instructions given by the trial court and the fact that Baker has already made this argument in his prior petition for certiorari. Likewise, Baker's Commerce Clause arguments constitute nothing more than a rehash of those already presented to this Court in his 1992 petition.

Finally, Baker cites cases which hold that a full and fair hearing is necessary for issue preclusion to obtain. Respondent has no quarrel with that basic proposition. However, Baker's arguments about "issue preclusion" and a "full and fair hearing" are simply irrelevant to the question of whether Florida was required to enforce this Alabama money judgment. Baker appeared and defended on the merits in Alabama, including the issue of personal jurisdiction. The Full Faith and Credit Clause was established for precisely this purpose, i.e., to bar the relitigation of one's case in a second state. Moreover, Baker's argument that he did not have a full and fair hearing relies again on unsupported allegations regarding political contributions. In any event, Baker was permitted a full and fair hearing. As the Florida District Court determined:

> That Baker had full and fair opportunity to litigate the *issue* of Alabama's in personam juris-

> diction over him cannot be denied - he, indeed, argued the issue extensively in both the trial and appellate courts of Alabama. . . .

(A-7)

Thus, the Florida court correctly held that the Alabama judgment was entitled to full faith and credit. This Court should deny the writ.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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